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** These transcripts were designated by the parties for inclusion in the record on appeal in the Ninth Circuit, but for some reason do not appear in the record as transmitted to this Court. They are included in this Appendix by mutual consent of the parties, and for the information of the Court.

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## DOCKET ENTRIES

U.S.A. v. David Gelbard, etc.

1971

January 22 - Fld Not of Mot of defts David Gelbard, etc, to quash search warrant; for return of property unlawfully seized (Rule 41, FRC) with affid of Atty Burton Marks in suppt of ord shortening time with copy of search warrant.

Fld (booklet) entitled Petition for Writ of Mandate/Prohibition; Application for temporary stay order pending submission to appellate Panel (FRAP Rule 21)

January 22 - Fld Pltf's oppos & response to Pltf's Mot to quash search warrant; for return of property unlawfully seized and order shortening time with affid of Robert S. Thaller, Atty in suppt.

January 25 - Hrg: Deft mot to quash search warrant. Court & cnsl confer. On mot of cnsl - Court ords hearing cont to 2/1/71, 1:30 pm bef (DWW)

February 8 - Fld Ord (EC) to show cause why David Gelbard Should Not be held in contempt.

February 11 - Fld Memo of pts & auths in oppos to order to show cause re contempt as to deft David Gelbard

February 12 - Fld Govt's Memo in Opposition to Furnishing Witnesses Transcripts of The Intercepted Conversations Prior to the Witnesses' appearance before the Grand Jury.

February 1 - Cnsl submit mot & Ct ords motn denied, to quash deft's search warr, & for retn of property unlawfully seized.

February 22 - Fld NOTICE OF APPEAL as to deft David Gelbard appealing from certain order made 2/17/71, by (EC) holding witness in contempt of Court for failure to answer questions bef the Grand Jury. Issd copies (EC-Cr. Duty Judge), U. S, Atty, U. S. Mars, P/O, deft & deft's cnsl, File, Admt Clerk. Paid $5.00 flg fee.

February 22 - Fld stip designation of Record (on Appeal) as to deft David Gelbard. Issd copy to U. S. Atty.

February 17 - Cnsl argue mot to Ct. Ct rules that matters are not to be litigated bef the G/J and are not appropriate bef this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appear that the statute is Constitutional. Wits is ord by Ct to appear bef the G/J & ans questions propounded or he will be held in contempt of Court. Wits advised that he still has the right to express the 5th amendment privilege. (EC)

February 17 - Hrg: the Govt cnsl state wits refused to testify bef G/J. Ct reptr Nancy Long CST, & reads questions propounded to wits. Ct ords wits to ans questions. Wits refuses to and questions. Ct finds wits in contempt of Court & ord wits committd to custy of A/G until question answered or as long as life of G/J, which ever is shorter. Mot by cnsl for stay of exec of commitmt until 12 noon on 2/23/71. Ct grants mot & ords wits to surr to U.S. Mars on that date & time or bench warrant will issue for his arrest. (EAC)

U.S.A. v. Sidney Parnas

1971

*February 12 - Fld Govt's Memo in Opposition to Furnishing Witnesses Transcripts of Their Intercepted Conversations Prior to The Witnesses' appearance before the Grand Jury. (EC)

February 16 - Fld Memo of Law re Rights of Witness Sidney Parnas under the So-Called "Wiretap Statute," Title 18/2510 Et Seq. USC, w/exhibits attached.

*February 10 - Hrg: Ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Wits moves Ct for cont for hrg. Ct grants mot & Ords hrg cont to 2/17/71, 9 am. All pts & auths to be fld by 2/16/71 at noon, by wits. Govt to file pts & auths by 2/12/71, 12 noon. (EC)

February 28 - Fld NOTICE OF APPEAL of Sidney Parnas appealing from order of (EC) entered in this action on 2/17/71, holding the deft in civil contempt of the Court and committed into custody of U. S. Attorney General until he purge himself of the contempt by appearing bef the Thompson Federal Grand Jury in Los Angeles, Calif. Issd copies (EC), U. S. Atty, U. S. Mars, P/O, deft & deft's cnsl File, Adm Clerk, Appeals Clerk. Paid $5.00 flg fee for flg Notice of Appeal.

February 22 - Fld stipulated designation of record on appeal. Oris & lay given to Davis

February 17 - Hrg in matter of Sidney Parnas: Cnsl argue mot to Ct. Ct rules that matters are not to be litigated bef G/J & are not appropriate bef this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appears statute is Constitutional. Wits is ord by Ct to appear bef G/J & ans questions propounded or he will be held in contempt of Ct. Wits advised that he still has the right to express 5th amendment privilege. (EAC)

February 17 - Hrg: Govt cnsl state wits has refused to testify bef G/J. Ct reptr Nancy Long CST & reads questions propounded to wits. Ct irds wits to answer questions. Wits refuses to ans. Ct finds wits in contempt of Ct & ord wits committed to custy A/G until questions are ans or as long as the life of the G/J, which ever is shorter. Mot by cnsl for stay of exec of commitmt until 12 noon 2/23/72. Wits to surr to U.S. Mars on that date. Ct grants wits to surr on that date & time or bench warr will for his arrest. (EAC)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA, v. DAVID GELBARD and David Gelbard Residence, a green stucco, one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, Calif., and depicted in the attached photographs, Defendants | Alphabetical File MISC No. 2636 Commissioner's Docket #112 Case Numbers 311 and 330 |

**NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure).**

[Filed January 8, 1971]

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND THE UNITED STATES OF AMERICA AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on January 25, 1971, at the hour of 9:30 A.M., in the courtroom of the Honorable David W. Williams, located in the Federal Courthouse, Temple and Spring Streets, Los Angeles, California, a motion will be made and is hereby made to quash search warrants numbered 311 and 330, copies of which are attached hereto as exhibits, and to return all property seized as a result of said search warrants.

These motions will be based upon the following grounds under the Fourth Amendment to the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure:

1. That the affidavits upon which the search warrants were premised (copies of which have been withheld from the moving party) were insufficient on their face to support the issuance of a search warrant.

2. The warrants on their face are general search warrants and void.

3. The articles seized allegedly pursuant to said search warrants were not properly seized and not particularized in the search warrants.

4. That the method of searching the house and the entry thereto was in violation of the United States Constitution and the laws of the United States of America.

5. That if the affidavits in support of these search warrants are valid on their face, that the evidence obtained to support the probable cause stated in said affidavit or affidavits was obtained as a result of a tap of Mr. Gelbard's telephone, whicff said tap was unlawful search and seizure under the Fourth Amendment to the United States Constitution for all of the reasons above enumerated as to the reasons for the defective affidavits in support of these search warrants. (*Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1966).)

These motions will be based upon the affidavits in support of the search warrants, the evidence oral and documentary as shall be produced at the hearing of these motions, and such Points and Authorities as shall be supplied to the Court in support of these motions at the time of the hearing.

DATED: January 6, 1971.

MARKS, SHERMAN & LONDON
A Professional Corporation

## AFFIDAVIT OF BURTON MARKS IN SUPPORT OF ORDER SHORTENING TIME

STATE OF CALIFORNIA )
: ss.
COUNTY OF LOS ANGELES )

BURTON MARKS, deposes and says:

I am an attorney at law duly authorized to practice law before all the Courts of this State and before this Honorable Court, and am a partner in the law firm of Marks, Sherman & London, a Professional Corporation, and one of the attorneys for David Gelbard, the moving party herein.

That on or about December 12, 1970, a search was made of the house of David Gelbard. Various items were recovered as set forth in the return to the search warrants, copies of said returns are attached hereto as exhibits.

Declarant is informed and believes and thereon alleges that the affidavits in support of the issuance of the search warrants were insufficient as a matter of law to establish probable cause for the issuance of the search warrants. Your declarant has been unable to see the said affidavits for reasons best known to the Government, not this declarant.

That an order shortening time to challenge the unlawful seizure of declarant's client's personal property is necessary because Mr. Gelbard has been subpoenaed to appear before the Grand Jury in this case on January 13, 1971 at 10:00 AM (a copy of said subpoena is attached hereto as an exhibit to this affidavit) and declarant is informed and believes and thereon alleges that the office of the United States Attorney intends to and will question Mr. Gelbard about items recovered from his home, which said items were unlawfully seized as aforesaid, and the Fourth Amendment to the United States Constitution prohibits the use of unlawfully seized evidence "for any purpose whatsoever" (*Fahy v. Connecticut*, 375 U.S. 85 (1963)).

Your declarant is further informed and believes and thereon alleges that much of the evidence obtained for the affidavits in support of the search warrants issued for the search of Mr. Gelbard's residence was obtained through the use or issuance of another "telephonic search warrant" or "telephone tap" and that such search warrants and the underlying affidavits were unconstitutional and void and not based on any probable cause which would be sufficient to unlawfully issue such a telephone tap or search warrant. That declarant has no access to said "tap search warrants nor to the underlying supporting affidavits.

WHEREFORE, your declarant respectfully prays that the order shortening time attached hereto issue from this Court so that a hearing may be had on the motions on the date set forth in the moving papers.

Dated: January 6, 1970.

Form A. O. 93 (Revised Oct. 1953) Search Warrant

# United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

Commissioner's Docket No. 12

Case No. 317

UNITED STATES OF AMERICA

v.

DAVID GELBARD

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

Affidavit having been made before me by Vance A. Duffy

that he {has reason to believe / suspects} that {on the person of / on the premises known as}

David Gelbard, 6681 Maryland Drive, Los Angeles, California

in the Central District of California

there is now being concealed certain property, namely line sheets; results of sporting events; odds; bet slips; records of wagering accounts and settlements; lists of bettors; telephone numbers; names; symbols and codes for bettors; currency and negotiable instruments; and other types of bookmaking records and wagering paraphernalia.

which are the fruits, instrumentalities and/or evidence of a violation o

Sections 371, 1952 and 1084 of United States Code, Title 18.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the {person / premises} above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the {person / premises} named for the property specified, serving this warrant and making the search {in the daytime / at any time in the day or night} and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 11th day of December, 19 70.

11:45 P.M.

THOMAS R. BARRY

U. S. Commissioner

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App. 9

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs.

Commissioner's Docket No. 12

Case No. 336

David Gelbard Residence, a green stucco one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, California, and depicted in the attached photographs.

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

Affidavit having been made before me by Vance A. Duffy, Special Agent, Federal Bureau of Investigation

that he { has reason to believe } that { ~~xxxxxxxxxxxx~~ on the premises known as } David Gelbard Residence, a green stucco one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, California, and depicted in the attached photographs, and contents therein, and including rooms, closets, cabinets, enclosures and safes therein, and the persons of any individuals found therein

in the Central District of California

there is now being concealed certain property, namely line sheets; results of sporting events; odds; bet slips; records of wagering accounts and settlements; lists of bettors; telephone numbers; symbols and codes for bettors; telephones; adding machines; currency and negotiable instruments; and other types of bookmaking records and wagering paraphernalia.

which are the fruits, instrumentalities and/or evidence of a violation
[have given affiant grounds for search and seizure]
of Sections 371, 1952 and 1084 of United States Code, Title 18.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the { ~~xxxxx~~ premises } above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the { ~~xxxxx~~ place } named for the property specified, serving this warrant and making the search { in the daytime. ~~xxxxxxxxxxxxxxxxxxxxxx~~ } and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 11th day of December, 1970

Richard J. Ss U.S.

Warren A. Ferguson
U.S.C.

1. FIVE PIECES OF PAPER AND ONE ENVELOPE WITH NUMEROUS NOTATIONS THEREON.

2. RED TELEPHONE DIRECTORY LABELED W. B. CLASSICK Co.

3. TWO SHEETS WITH GRID, WITH NAMES OF TENNIS AND PLUS & MINUS FIGURES.

4. WHITE BOOK WITH A FEW YELLOW PAPER. BOOK LABELED VISTA DEL MAR, CHILD-CARE SERVICE, 1970 CALENDAR AND APPOINTMENT BOOK.

5. BLUE BOOK LABELED APPOINTMENTS 1970."

This is to certify that on DECEMBER 12, 1970 at Los Angeles, Calif., Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, at the time of conducting a search of my person and/or the premises at 6681 Hillegrand Dr. obtained the items listed above on this page and 1 other pages. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.

(SIGNED) [signature]

Witnessed:

[signature]
Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

[signature]
Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

P. 2 of 3

6. LETTER ADDRESSED TO DAVID GELBARD FROM AETNA INSURANCE CO. DATED 6/18/87. NUMEROUS NOTATIONS IN BLUE INK ON PAPER.

7. SMALL SLIP OF PAPER WITH NAME, "WILLIAM H. NORDELL, 1843 LAKE STREET, GLENDALE, CALIFORNIA 91201, 242-1875," WRITTEN THEREON.

8. ENVELOPE ADDRESSED TO DAVE GELBARD FROM ARTHUR SHERMAN ATTORNEY WITH NUMEROUS NOTATIONS.

9. BROWN DIARY LABELED "COURTESY OF LASCCO BRAND."

10. BROWN ADDRESS BOOK.

11. WOMAN'S RAIN SHOE CONTAINING $662.00 IN 50'S, 20'S, 10'S, 5'S AND 1'S IN U.S. CURRENCY. SAID $662.00 returned.

p. 3 of 3

12. $210.00 in $50's and 10's in U.S. currency located in woman's dress in Mother Clout.

13. $384.00 in U.S. currency and Check in amount of $11.80 made on Franklin National Bank payable to order of Leo Fishman, 2548 Cancliff St., Ft. Check # CT, 133520, dated - 12/2/70, and numerous slips of paper with notations.

14. Five pieces of paper with various notations

15. Vol. 7, No. 15 of J.K. Sports Journal, Games ending Sunday 12/2-/70.

16. Two type written paper sheets with teams listed with + and - figures.

1

AO Form No. 110 (Rev. 5-60) Subpoena To Testify Before Grand Jury

# United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

To David Colbard
6681 Maryland Drive
Los Angeles, California

You are hereby commanded to appear in the United States District Court for the Central District of California at Rm. 1346, U. S. Courthouse, 312 No. Spring Street in the city of Los Angeles on the 13th day of January 19 71 at 10:00 o'clock A. M. to testify before the Grand Jury ~~concerning violations~~.

This subpoena is issued on application of the United States.

WILLIAM MATTHEW BYRNE, JR.
United States Attorney
ALFRED H. KING
Special Attorney, Dept. of Justice
Telephone: (213) 688-5808

Date December 11, 1970

SHERRY G. HARTMAN, Clerk

By TERRI STORMS, Deputy Clerk

1. Unless the words "and bring with you" appear the subpoena is to require the appearance of witnesses or parties only, in which case the clause need not be completed or the blank space provided for item 2 filled.

## RETURN

Received this subpoena at on and on at I served it on the within named by delivering a copy to h

Date , 19

By

Service Fees
Travel $
Services
Total $

AFFIDAVIT OF PERSONAL SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; I served the NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure) in this action by personally delivering to and leaving with the following person at the County of Los Angeles, State of California, on the date set opposite their respective names, a true copy thereof, to wit:

Martha Schofield
a person authorized to accept service on behalf of the United States Attorney General — 312 N. Spring St. Los Angeles, Calif. 1/8/71

DATED: January 8, 1971.

Robert C. Hayman

Subscribed and Sworn to Before Me this Date.

Notary Public

OFFICIAL SEAL
[illegible] CUTLER

ACKNOWLEDGMENT OF SERVICE

This will acknowledge service of a copy of NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure) this date.

DATED: January 8, 1971.

Office of the U.S. Attorney
General

**OPPOSITION AND RESPONSE TO PLAINTIFF'S MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED; and ORDER SHORTENING TIME**

[Filed January 22, 1971]

Defendant, United States of America, hereby opposes and responds to the motions filed on behalf of Plaintiff David Gelbard. Said opposition is based on the files and records of this case, as well as the attached affidavit.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

---

**AFFIDAVIT OF ROBERT S. THALLER**

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

ROBERT S. THALLER being duly sworn, states the following:

1. I am an attorney employed by the Organized Crime and Racketeering Section, U. S. Department of Justice.

2. I am conducting the investigation for which Mr. Gelbard has been subpoenaed to appear before the grand jury and for which a search warrant was executed on his property.

3. The search of Mr. Gelbard's residence was executed under lawful warrant on December 12, 1970 with probable cause being determined to exist by U. S. Commissioner Thomas R. Berry.

4. To my knowledge, all information resulting from wiretaps, mentioned in the affidavit in support of the search

warrant was obtained from wiretaps conducted pursuant to Court order as provided in 18 U.S.C. 2518.

5. That Mr. Gelbard's telephone was not the subject of any such order or application for such.

6. To my knowledge David Gelbard is not a subject of process in this Court other than the subpoena before the Grand Jury for February 3, 1971 and the subject search warrant.

7. No reason appears why David Gelbard cannot fully protect his rights before the grand jury by either testifying truthfully or asserting his right under the Fifth Amendment to the U. S. Constitution not to incriminate himself.

---

**CRIMINAL MINUTES - GENERAL**

Case No. 2636-MISC. Date Feb. 1, 1971

DOCKET ENTRY: Couns submit mot and Ct ords mot DENIED.

PROCEEDINGS: HEARING: Defendant's motion to quash search warrant; and for return of property unlawfully seized.

---

**MOTION FOR ORDER TO SHOW CAUSE WHY DAVID GELBARD SHOULD NOT BE HELD IN CONTEMPT**

[Filed February 5, 1971]

Plaintiff, United States of America, hereby moves the Court for an Order to Show Cause why David Gelbard should not be held in civil or criminal contempt for failure to appear before a federal Grand Jury of the Central District of California (Thompson Grand Jury) on February 3, 1971, pursuant to subpoena, and as grounds therefor,

attaches hereto the affidavit of Robert S. Thaller, Special Attorney, U. S. Department of Justice.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

---

## AFFIDAVIT OF ROBERT S. THALLER

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

ROBERT S. THALLER being duly sworn, states the following:

1. That I am a Special Attorney for the U.S. Department of Justice, Organized Crime & Racketeering Section.

2. That I am currently assisting the United States Grand Jury for the Central District of California at Los Angeles (Thompson Grand Jury) in a criminal investigation of possible violations of 18 USC 1952 (ITAR) and 18 USC 1084 (Interstate transmission of wagering information).

3. On December 12, 1970 I caused a subpoena to be served upon David Gelbard commanding his appearance to testify before the Thompson Grand Jury in Los Angeles on January 13, 1971 at 9:30 A.M.

4. Subsequently, I notified Burton Marks, counsel for David Gelbard, that Gelbard's appearance had been continued to February 3, 1971 and for Mr. Mark's convenience the time was set for 10:30 A.M. or shortly thereafter.

5. A few moments before David Gelbard's scheduled appearance before the Thompson Grand Jury, Mr. Mark's informed me that because the Government had not furnished his client with transcripts of his conversations which were overheard by electronic surveillance he was instructing

David Gelbard not to answer any questions before the Grand Jury.

6. That when the time for his appearance came, David Gelbard entered the Grand Jury chamber but refused to be administered the oath by the foreman or answer any questions. His only response was that his attorney had instructed him to refuse to take an oath and to refuse to answer any questions.

7. That David Gelbard was overheard in telephone conversations that were being electronically surveilled pursuant to an order of the District Court, Central District of California.

---

**ORDER TO SHOW CAUSE WHY DAVID GELBARD SHOULD NOT BE HELD IN CONTEMPT**

[Filed February 8, 1971]

IT IS HEREBY ORDERED that David Gelbard appear before this Court and show cause as to why he should not be held in civil or criminal contempt for failure to testify before a federal Grand Jury of the Central District of California on February 3, 1971, pursuant to subpoena.

IT IS FURTHER ORDERED that hearing on this Order to Show Cause shall be held on Wednesday, February 17, 1971, at 9:00 A.M., before this Court, and David Gelbard is hereby ordered to be present with his counsel at that time.

DATED: February 8, 1971

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

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## CRIMINAL MINUTES – GENERAL

Case No. 2658 Date Feb 10, 1971

DOCKET ENTRY: Hrg: ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Witness moves ct for cont of hrg. Ct grants mot & ords Hrg cont to 2/17/71 at 9 am. All pts & auths to be fld by 2/16/71 at noon, by wit. Govt to file pts & auths by 2/12/71 at 12 noon. (EAC)

PROCEEDINGS: Government makes motion to the Court to compel the witness to answer questions before the Grand Jury. Court and counsel confer. Witness makes motion for continuance of hearing. Court grants motion and orders hearing continued to 2/17/71 at 9 am. Government to file all briefs by 2/12/71. Witness to have all briefs filed by noon on 2/16/71.

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## MEMORANDUM OF POINTS AND AUTHORITIES OPPOSITION TO ORDER TO SHOW CAUSE RE CONTEMPT.

[Filed February 11, 1971]

### PRELIMINARY

Although the proceedings before the Court are not literally a "contempt" because there has been no order of a "court" which has been disobeyed, respondent, through his attorney, is willing to stipulate to certain preliminary facts so that the issues upon which the Court should rule can be decided in the context of an adversary proceeding.

We, therefore, presume for the purpose of the following argument that Mr. Gelbard refuses to be sworn and testify as a witness until he can be provided transcripts of any telephone intercept under the provisions of 18 U.S.C. § 2514, et seq.; and, in any event, that although he might "testify," there is no requirement that he testify under oath.

## ISSUES

Respondent Gelbard contends that so long as it is the intention of the United States Attorney's Office and/or the Grand Jury to utilize evidence obtained through a wiretap, that any order of the Court requiring such testimony would be an unlawful order and, therefore, not the subject of a contempt proceeding on one or more of the following grounds:

1. That the statute authorizing wiretaps is unconstitutional and void in violation of Amendments I, IV, V to the United States Constitution.

2. That a Grand Jury proceeding is a "hearing" which entitles the witness to have a transcript of any conversation he may have had on the telephone which was intercepted by the Government through Court order.

3. That insofar as the witness Gelbard had his telephone "tapped" even though he was merely talking to another party whose telephone was in fact the subject of a wiretap or telephone was in faot the subject of a wiretap or telephone intercept, that the Government may not use the information obtained for any purpose whatsoever until an opportunity is given to challenge the validity of the telephone intercept, i.e., "traverse" the search warrant either pursuant to rule 41 or § 2518.

4. That notwithstanding all of the above, no rule of Court or law of the United States requires that a witness testify under oath before a Grand Jury or any Court tribunal and any order to be sworn in would be an invalid order.

## ARGUMENTS AND POINTS AND AUTHORITIES

Attached are the points and authorities in support of moving papers submitted on behalf of Gelbard. They are incorporated herein as though fully set forth at length as are the points and authorities in the case of *U.S.A. v. Blott*, 70-143-Cr-TC, United States District Court, Southern Dis-

trict of California, which are also incorporated herein as though fully set forth at length.

In support of the First Amendment argument, it is submitted that a wiretap in any form as permitted here under the authority of *Blount v. Rizzi*, U.S. Supreme Court Docket No. 55 and 58, decided January 14, 1971, a copy of which is attached hereto for the Court's consideration, is authority for the proposition that to permit a wiretap or interception of any form puts a chill on the exercise of free speech because of the fear of a person using a telephone that he might be overheard by the Government . . . and that the use of a telephone, just like the use of the mails, is as much a part of speech as is one's tongue. The case of *Castro v. Superior Court*, 9 Cal. App.3d 675 (1970), and the authorities cited therein by Justice Kaus, are persuasive that the extent of permissible telephone interception to both innocent and "guilty" conversations vitally restricts the use of the telephone and is a prior restraint on free speech.

DATED: February 11, 1971.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| DAVID GELBARD,<br><br>Petitioner,<br><br>v.<br><br>Honorable Albert Lee Stephens, Jr., Chief Judge, Honorable David W. Williams, Judge, United States District Court Central District of California; John N. Mitchell, Attorney General for the United States; and Robert Meyer, United States Attorney for the Central District of California,<br><br>Respondents | NO._____<br>(Court below:<br>MISC NO._____<br>Commissioner's Docket No. 112<br>Case nos 311 and 330 |

## APPLICATION FOR A STAY ORDER

TO ANY JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

This is an Application for Temporary Restraining Order restraining the Respondents MITCHELL and MEYER, their agents, servants and employees from conducting any proceedings in the Grand Jury or any hearing wherein evidence which has been seized has not been previously determined to be or have been unlawfully seized and further asks for an order restraining the Respondent Judges from permitting the conducting of any Grand Jury proceedings or the answering of any questions by Petitioner in any Grand Jury proceedings wherein it is ascertained that the Grand Jury proceedings are being conducted as a furtherance of investigation of materials obtained through the use of telephonic tap search warrants and/or ordinary search warrants, the affidavits of which are based on said telephonic search warrants such as in the case of Petitioner herein.

This Application is based upon the verified Petition for Writ of Mandate/Prohibition filed herein and the points and authorities and affidavits in support of said Petition and is premised on the fact that the ordinary rules of this Court requiring submission of such application to a panel cannot be timely complied with because of the eminence of a proceeding before the Grand Jury on January 13, 1971 where the Petitioner herein has been subpoenaed as a witness after his telephone has been tapped and his house searched, and where he has had no opportunity to have recourse to the Courts to challenge.

DATED: January 11, 1971.

MARKS, SHERMAN & LONDON
A Professional Corporation

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## PETITION FOR WRIT OF MANDATE/PROHIBITION

TO THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT AND ANY PANEL THEREOF:

This is an Application for a Writ of Mandate/Prohibition under Federal Rules of Appellate Procedure, Rule 21, which the following relief is requested:

A. To restrain the Department of Justice and its agents and/or the United States Attorney's Office from utilizing evidence in Grand Jury proceedings or any proceeding whi evidence has been seized through search warrants based on telephone taps, or otherwise, prior to an opportunity being given to the Petitioner or any other person similarly situated to challenge the validity of the seizures, the enabling statute (18 USC § 2518) and the search warrants; and

B. To restrain Respondent Court prohibitive from permitting the conducting of a Grand Jury proceeding or hearing wherein such evidence is contemplated to be used and which is being used in direct violation of the explicit pro-

visions of 18 USC § 2518, irrespective of the validity of that Section or the validity of the searches and seizures.

In support of this joint Writ, Petitioner alleges:

1. That he is a citizen of the United States and resides at 6681 Maryland Drive, Los Angeles, California.

2. That on or about December 12, 1970, Petitioner's person and house were searched pursuant to a search warrant bearing Commissioner's Docket No. 112, Case Numbers 311 and 330, and that these search warrants were based upon an affidavit filed with the Commissioner.

3. That the affidavit in support of search warrants 311 and 330 states on its face tht information obtained to establish "probable cause" for the issuance of search warrants 311 and 330 was a result of a telephone interception by the United States District Court Central District of California under the provisions of 18 USC § 2518.

4. That Petitioner has been subpoenaed to appear before the Grand Jury, United States District Court for the Central District of California on January 13, 1971 at 10:00 AM to testify before said Grand Jury and that said Grand Jury investigation is being conducted jointly by the United States Attorney's Office through Respondent ROBERT MEYER and the Department of Justice under the authority of Respondent JOHN N. MITCHELL and that each of the said Respondents intends to and will utilize evidence obtained as a result of the search warrants and telephone taps.

5. That Petitioner has attempted to file a motion to suppress evidence to challenge the validity of the search warrants under rule 41 of the Federal Rules of Criminal Procedure and through his attorney attempted to obtain an order shortening time so that such motions could be heard at 2:00 PM on January 11, 1971 in front of the Honorable David W. Williams; that said application for an order shortening time was denied by the Honorable David W. Williams (see affidavit of Burton Marks attached); as a consequence

the motions had to be noticed as of January 25, 1971 at 9:30 AM after the proposed Grand Jury hearings are to be heard.

6. That Respondents MITCHELL and MEYER, their agents, servants and employees have refused to and continue to refuse to disclose to Petitioner or his attorneys the contents of the wire taps and/or the contents of the affidavits issued in support of said wire taps, and Petitioner is informed and believes and thereon alleges that the affidavits in support of said wire taps others have been ordered sealed by a Judge or Judges of the United States District Court.

7. Affiant is informed and believes and thereon alleges that Respondents HONORABLE ALBERT LEE STEPHENS, JR., CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and Respondent DAVID W. WILLIAMS Judge for said Court, have, by their failure to permit the disclosure of affidavits in support of the wire taps or wire tap communications and/or ordered the sealing of said wire taps and/or by refusing to permit hearings on the validity of the search warrants prior to the hearing of the Grand Jury have violated the express provisions of 18 USC § 2518 which provides that:

> "(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a federal or state court unless each party, not less than ten days before the trial, hearing or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved."

8. That sub-section 10 of Title 18 USC § 2518 permits an aggrieved person to challenge the validity of the wire tap. This contemplates a challenge prior to any "hearing" but nevertheless, this opportunity has been denied to Petitioner.

9. That Title 18 USC § 2518 is unconstitutional and void in violation of Amendments One, Four, Five, Six and Nine

to the United States Constitution in one or more of the following respects, as a consequence any evidence obtained as a result of an order under said unconstitutional statute is void. The evidence cannot be used for any purpose whatsoever (*Fahy v. Connecticut*, 375 U.S. 85 (1963)) for the following reasons:

1. Said statute is overbroad and has a "chilling" effect upon the exercise of free speech over the telephone and is an unconstitutional prior restraint.

2. That the statute on its face and/or as applied herein permits such a lack of specificy in the issuance of a wire tap that it allows for "general" search warrants.

3. Said statute permits governmental intrusion into individuals' right to privacy.

4. The statute fails to provide for an immediate hearing, as soon as the wire tap is completed, with notice to the person whose conversation has been intercepted and whose property has been seized to challenge the validity of the wire tap and an opportunity to have his property and/or words returned.

5. The search of Petitioner's house was invalid and in violation of Amendments Four, Five and Six to the United States Constitution in that there was no probable cause for the issuance of said search warrants; that the underlying probable cause, if any obtained was obtained as a result of an unlawful wire tap secured without probable cause and predicated upon a void statute.

Petitioner has no plain, speedy or adequate remedy at law other than by this Petition for Writ of Mandate/Prohibition to protect his rights guaranteed under the Constitutional provisions hereinabove stated.

WHEREFORE, Petitioner respectfully prays that a Writ of Mandate/Prohibition issue as applicable directed to the Respondents (and that a temporary stay order first issue to the urgency of the situation pending the hearing on this matter) restraining the Respondents MITCHELL and MEYER

from conducting any proceedings wherein suspect evidence may or is being contemplated is used for investigation purposes where such evidence was obtained as a result of a wire tap and/or search warrants after wire tap has been obtained and where the Petitioner is a party to these proceedings or suspected to be a party to these proceedings before a hearing is afforded to Petitioner to challenge the validity of the searches and telephone taps and that all applications for the telephone taps be made available to the Petitioner or his attorneys.

Petitioner further prays that the Respondent Judges be restrained from permitting Grand Juries to proceed to investigate any matters whatsoever wherein it is contemplated that evidence seized as a result directly or indirectly of wire tap on Petitioner's telephone is to be used in the process of investigation until the Petitioner is first afforded an opportunity to have a full hearing to challenge the validity of the searches and seizures and/or the validity of 18 USC § 2518.

In the alternative this Petitioner prays that this Court declare Title 18, USC § 2518 to be null, nugatory, void and unconstitutional in violation of Amendments One, Four, Five, Six and Nine to the United States Constitution for the reasons set forth in the points and authorities in support of this Petition and order the Respondents MITCHELL and MEYER to surrender up to Petitioner and others who may be similarly situated all materials, evidence, investigation of any manner whatsoever which have been obtained by and through the use of said telephone taps or wire interceptions under the auspices of said statute.

DATED: January 11, 1971.

## AFFIDAVIT OF BURTON MARKS IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND FOR STAY ORDER

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

BURTON MARKS, being duly sworn, deposes and says:

That he is an attorney at law duly authorized to practice before all the Courts of this State and before the United States District Court for the Central and Southern Districts of California and before this Honorable Court; that he is one of the attorneys for Petitioner David Gelbard and if called and sworn could competently testify to the facts as hereinafter stated.

That Petitioner David Gelbard has been subpoenaed to appear before a Grand Jury panel in the Central District of California on January 13, 1971 at the hour of 10:00 A.M. That these Grand Jury proceedings are being conducted, to the best information that this Affiant has, by the United States Department of Justice through its special "strike force" which has been organized, at least ostensibly, for the purpose of combating "orgaized crime."

Affiant is further informed and believes and thereon alleges that the said "strike force" has, for the past several months, been investigating bookmaking activities in and about the Los Angeles area, and throughout the country and in furtherance of this investigation did assist agents of the Federal Bureau of Investigation in obtaining "wire tap" search warrants and ordinary garden variety search warrants for the purpose of obtaining evidence in furtherance of these investigations. That in fact the search warrant was issued for the search of Petitioner's house andsperson on the 11th day of December, 1970.

Affiant has had an opportunity to examine the affidavit in support of the search warrant which is quite lengthy, and in the opinion of Affiant who has practiced in the area of

criminal and constitutional law for the past fifteen years, said affidavit in support of said search warrant is legally insufficient and deficient. Said affidavit constantly refers to information which was obtained by the Affiant in that affidavit as a result of a prior wire tap. Affiant has been unable to obtain the affidavits in support of the search warrant issued to tap the telephones of Affiant's client, and therefore cannot make any particular statements as to the sufficiency of said affidavits; except that it is the opinion of this Affiant that the statute authorizing the issuance of broad exploratory search warrants is in itself unconstitutional and void in violation of Amendments One, Four, Five and Nine to the United States Constitution, and that consequently the affidavits in support of a broad search warrant must necessarily, of themselves be so broad as to be constitutionally deficient and lacking in probable cause.

Based upon these conclusions and based upon the research and points and authorities which are attached hereto and made a part of this petition, and upon the facts as hereinafter set forth regarding the activities of the United States Government and its officers and employees, Affiant is of the opinion that it is and has been at all times the intention of the representatives of the United States Government, to wit: the Department of Justice and its agents and employees and the Federal Bureau of Investigation and its agents and employees, to utilize the evidence obtained through the use of ordinary and telephone tap search warrants to conduct or assist in the conducting of a Grand Jury investigations and inquiries, and it is further their intention to utilize this evidence to pin-point questions to be asked of the various witnesses including Petitioner herein. Affiant is also of the opinion and based upon the foregoing that there is a substantial probability that the evidence obtained by the United States Government through the use of the telephonic tap search warrants and consequently the ordinary search warrants is evidence obtained in violation of the mandates of the United States Constitution and that therefore said evidence cannot be used in a Grand Jury proceed-

ing or for any purpose whatsoever . . . and such evidence should be returned to its rightful owners forthwith along with any copies made thereof and/or any notes or documentation made as a result of said unlawful search.

That on or about January 6, 1971, Affiant presented to the Clerk for the United States District Court for the Central District of California a document entitled "NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure); and ORDER SHORTENING TIME." A copy of said moving papers is attached to this Petition and marked as an Exhibit and incorporated in this Affidavit as though fully set forth at length. Within the body of the moving papers it was requested that a hearing be had on January 11, 1971 to determine the validity of the warrant or warrants used for the purpose of securing evidence against the Petitioner herein, and request was made for an order shortening time.

On January 7, 1971, at approximately 9:00 AM, a conference was had in the chambers of the Honorable David W. Williams, who is presently the "master calendar" judge in charge of the Grand Jury panel with your affiant present and Mr. Michael A. DeFeo and also an assistant United States attorney whose name Affiant cannot recall at this particular moment. At that time Affiant expressed to the Court the proposition that the Grand Jury proceedings could not be conducted wherein questions were directed toward evidence unlawfully seized and that it was therefore imperative that a early hearing be had to determine the validity of the search warrant prior to the Petitioner being called as a witness. The request for an order shortening time was denied as was this Affiant's suggestion that the Grand Jury proceedings insofar as Mr. Gelbard was concerned should be stayed pending a determination of the validity of the search warrants and the right to recover the property seized.

Affiant is now involved or has been involved in three cases originating out o: the Central District of the United States District Court wherein the use of telephonic taps and search warrsnts for said taps have been secured. As far as Affiant can observe there are several common factors which run through these telephonic search warrant cases, at least insofar as their application is in the Central District. First of all, in the three cases of which Affiant has become acquainted (mentioning only principal defendants, this Petitioner; Vasquez; and Zerowitz) and they are as follows:

1. The telephonic tap search warrants are issued by the same judge (the Honorable A. Andrew Hauk).

2. As the telephone tap progresses, additional requests are made for extensions of time in which to tap, affidavits being filed which detail the material already discovered in the prior telephone taps. These extensions are granted.

3. All affidavits in support of the telephone taps and the material obtained from the taps are ordered sealed apparently for whatever period of time the Department of Justice or the United States Attorney's Office requests. Defense counsel are not permitted to have access to the material until the government is finished with it.

All affidavits in support of the search warrants are also ordered sealed and not made available for defense counsel so that it is utterly impossible to challenge the search warrants.

In two out of three of the cases (this Petitioner and the Zerowitz matter) additional ordinary search warrants have been issued as a result of the telephone taps and after the issuance of the ordinary search warrants and seizures of evidence made, Grand Jury investigations are scheduled wherein various persons from whom the material has been seized or who are in some way associated with the seized material are called in to testify before the Grand Jury before indictments are issued.

That this Affiant, as an attorney, in observing thelengths of the telephone taps permitted and the types of inquiries which exist within the Government, states that this Affiant is afraid to converse on the telephone with clients. Similarly, Affiant's clients are afraid to talk on their telephones for fear that they are tapped; that this fear of conversing over the telephone instigated by the Government through the use and misuse of telephone taps as purportedly authorized by the Congress of the United States puts a ' chill" on the exercise of free speech.

In the opinion of this Affiant, the United States Department of Justice and the United States Attorney's Office for the Central District of California have created a plan of action using an illegal and unconstitutional statute, to wit: 18 USC § 2518, together with the subpoena and investigative power of the Grand Jury, all of which are arms of the Courts of the United States, to utilize evidence unlawfully seized for the purpose of their own "investigations" and to thwart and prevent citizens whose property and words which have been seized from exercising their rights to access to the Courts for the purpose of having the legality of the searches and seizures challenged, all of which constitutes a denial of due process of law, deprivation of the right to counsel, an abridgement of free speech, all in violation of Amendments One, Four, Five, Six and Nine (invasion of privacy) to the United States Constitution.

Further, Affiant believes that acquiesence into these procedures by the Judges of the United States District Court in declining to grant access to the affidavits in support of the telephonic search warrants and ordering them sealed . . . and in refusing access to the Courts in a timely fashion so that appropriate rulings may be made as to the legality of the searches and seizures aids and abets the plan of the Government to utilize the unlawfully seized evidence at special hearings and is directly contrary to the express mandate of 18 USC § 2518 which provides that if affidavits in support of telephonic search warrants are not supplied to the

person whose telephone is tapped, a minimum of ten days before a "hearing" the evidence cannot be used at all.

The earliest possible date for hearing motions to suppress under the "17-day rule" of the Rules of Court is January 25, 1971, and a suppression motion has been noticed for that date at the hour of 9:30 AM in front of the Honorable David W. Williams.

WHEREFORE, Affiant respectfully prays that the temporary restraining order and the writ of mandates herein prayed for issue.

Affiant says nothing further.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure); and ORDER SHORTENING TIME**

TO: THE CLERK OF THE ABOVE ENTITLED COURT AND THE UNITED STATES OF AMERICA, AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on January 11, 1971, at the hour of 2:00 PM in the courtroom of the Honorable David W. Williams, located in the Federal Court House, Temple and Spring Streets, Los Angeles, California, a motion will be made and is hereby made to quash search warrants numbered 311 and 330, copies of which are attached hereto as exhibits, and to return all property seized as a result of said search warrants.

These motions will be based upon the following grounds under the Fourth Amendment to the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure:

1. That the affidavits upon which the search warrants were premised (copies of which have been withheld from the moving party) were insufficient on their face to support the issuance of a search warrant.

2. The warrants on their face are general search warrants and void.

3. The articles seized allegedly pursuant to said search warrants were not properly seized and not particularized in the search warrants.

4. That the method of searching the house and the entry thereto was in violation of the United States Constitution and the laws of the United States of America.

5. That if the affidavits in support of these search warrants are valid on their face, that the evidence obtained to support the probable cause" stated in said affidavit or affidavit was obtained as a result of a tap of Mr. Gelbard's telephone, which said tap was unlawful search and seizure under the Fourth Amendment to the United States Constitution for all of the reasons above enumerated as to the reasons for the defective affidavits in support of these search warrants. (*Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1966).)

These motions will be based upon the affidavits in support of the search warrants, the evidence oral and documentary as shall be produced at the hearing of these motions, and such Points and Authorities as shall be supplied to the Court in support of these motions at the time of the hearing.

DATED: January 6, 1971.

## AFFIDAVIT OF BURTON MARKS IN SUPPORT OF ORDER SHORTENING TIME

STATE OF CALIFORNIA )
: ss.
COUNTY OF LOS ANGELES )

BURTON MARKS, deposes and says:

I am an attorney at law duly authorized to practice law before all the Courts of this State and before this Honorable Court, and am a partner in the law firm of Marks, Sherman & London, a Professional Corporation, and one of the attorneys for David Gelbard, the moving party herein.

That on or about December 12, 1970, a search was made of the house of David Gelbard. Various items were recovered as set forth in the return to the search warrants, copies of said returns are attached hereto as exhibits.

Declarant is informed and believes and thereon alleges that the affidavits in support of the issuance of the search warrants were insufficient as a matter of law to establish probable cause for the issuance of the search warrants. Your declarant has been unable to see the said affidavits for reasons best known to the Government, not this declarant.

That an order shortening time to challenge the unlawful seizure of declarant's client's personal property is necessary because Mr. Gelbard has been subpoenaed to appear before the Grand Jury in this case on January 13, 1971 at 10:00 AM (a copy of said subpoena is attached hereto as an exhibit to this affidavit) and declarant is informed and believes and thereon alleges that the office of the United States Attorney intends to and will question Mr. Gelbard about items recovered from his home, which said items were unlawfully seized as aforesaid, and the Fourth Amendment to the United States Constitution prohibits the use of unlawfully seized evidence "for any purpose whatsoever" (*Fahy v. Connecticut*, 375 U.S. 85 (1963)).

Your declarant is further informed and believes and thereon alleges that much of the evidence obtained for the affidavit in support of the search warrants issued for the search of Mr. Gelbard's residence was obtained through the use or issuance of another "telephonic search warrant" or "telephone tap" and that such search warrants and the underlying affidavits were unconstitutional and void and not based on any probable cause which would be sufifcient to unlawfully issue such a telephonic tap or search warrant. That declarant has no access to said "tap search warrants nor to the underlying supporting affidavits.

WHEREFORE, your declarant respectfully prays that the order shortening time attached hereto issue from this Court so that a hearing may be had on the motions on the date set forth in the moving papers.

Dated: January 6, 1970.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**EXCERPT FROM PROCEEDINGS OF THURSDAY, MARCH 18, 1971 BEFORE: KOELSCH, CARTER and TRASK, Circuit Judges.**

ORDER OF SUBMISSION

This cause coming on for hearing, Burton Marks, Esq. and Adrian Marshall, Esq. argued for the appellants and Alfred N. King, Esq. argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
DAVID GELBARD,
*Defendant-Appellant.*
No. 71-1263

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
SIDNEY PARNAS,
*Defendant-Appellant.*
No. 71-1264

[June 8, 1971]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH, CARTER and TRASK, Circuit Judges

PER CURIAM:

These consolidated appeals involve persons who proved recalcitrant when they appeared as witnesses before a federal grand jury and who were each committed to custody pursuant to 28 U.S.C. § 1826(a), after being adjudged guilty of civil contempt. In order to meet the rigorous statutory time limit imposed by 28 U.S.C. § 1826(b) it was necessary to, and this court did, immediately following oral argument, render decision. We affirmed the judgment of the court below and stated an opinion would follow. This is that opinion.

Both Gelbard, the appellant in No. 71-1263, and Parnas, the appellant in No. 71-1264, refused to answer any questions based upon information gained by the government from wiretapping

authorized by the district court pursuant to 18 U.S.C. § 2518, which is a part of Title III of the Omnibus Criminal Control Act and Safe Streets Act of 1968, Pub. L. 90-351, June 19, 1968, 82 Stat. 218. When cited for contempt in the district court, each attacked the constitutional validity of Section 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured. The court rejected their contentions and held the statute valid.

We find it unnecessary to consider the district court's finding that Section 2518 is constitutionally valid. A witness before a grand jury lacks standing to challenge a statute on constitutional grounds unless the statute directly bears upon his privilege against self-incrimination. *Carter v. United States*, 417 F.2d 384, 386-7 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970). Section 2518 is not in that category.

It appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding. See *Cobbledick v. United States*, 309 U.S. 323 (1940); *Costello v. United States*, 350 U.S. 359 (1956) and *Lawn v. United States*, 355 U.S. 339 (1958). Finally, we agree with the Fifth Circuit's decision in *Dudley v. United States*, 427 F.2d 1140, 1141 (5th Cir. 1970) "that nothing in the Omnibus Act, particularly § 2518(10)(a) created a statutory exception which would permit a pre-indictment motion to suppress evidence that might be presented to the grand jury. . . . The legislative history of the Act supports this conclusion. See Senate Report No. 1097, 90th Cong. 2d Sess. (1968) at p. 2195."[1]

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[1]The report contains this statement:

"Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 384 U.S. 251 (1965)). There is no intent to change the general rule."

Neither does 18 U.S.C. § 2518(9) support appellants in their contention.

*David Gelbard and Sidney Parnas*

that as witnesses they were entitled to copies of the applications and orders for the interceptions, together with transcripts, tapes, etc.

The language of paragraph (9) does not so indicate and the Legislative Report shows that paragraph (9) must be read in pari material with paragraph (10). Thus, paragraph (9) is intended to enable a party charged with a criminal offense or facing other adversary proceeding to secure copies of the application for and the order permitting the interception to enable him to move to suppress evidence so gathered; but it does not extend to grand jury proceedings. As the Report states: " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing." *Id.* p. 2195.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

v.

No. 71-1263

DAVID GELBARD,
*Defendant-Appellant.*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

No. 71-1264

SIDNEY PARNAS,
*Defendant-Appellant.*

**Appeal from the United States District Court for the Central District of California**
[June 8, 1971]

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 8, 1971

**EXCERPT FROM PROCEEDINGS OF WEDNESDAY, JUNE 23, 1971 BEFORE: KOELSCH, CARTER AND TRASK, CIRCUIT JUDGES.**

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants filed March 31, 1971 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, suggestion for a reharing in banc is rejected.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**GOVERNMENT'S MEMORANDUM IN OPPOSITION TO FURNISHING WITNESSES TRANSCRIPTS OF THEIR INTERCEPTED CONVERSATIONS PRIOR TO THE WITNESSES' APPEARANCE BEFORE THE GRAND JURY**

[Filed February 12, 1971]

FACTS

The witnesses, Sidney Parnas and David Gelbard, have been called before the Grand Jury to testify as to their knowledge in two totally unconnected areas. (For the Court's information, the Government is unaware of any connection whatsoever between Parnas and Gelbard.) In the case of both witnesses, a premises under his control has been searched pursuant to a warrant issued by a United States Commissioner. Recited in the affidavit submitted to the Commissioner to establish probable cause in both instances were excerpts of intercepted conversations to which Parnas or Gelbard, as the case may be, were parties.

Neither Mr. Parnas nor Mr. Gelbard have been arrested in connection with these matters, or in connection with any other matter to the Government's knowledge. Neither Mr. Parnas nor Mr. Gelbard are being contemplated as defendants by an sovereignty to the Government's knowledge. Both individuals have been summoned to testify concerning their knowledge of individuals who are defendants in this Court: Mr. Parnas as to Mr. Jerome Zarowitz and others; Mr. Gelbard as to Mr. Gerald Hay Kilgore and others. The matters as to which their testimony is sought are not related to the criminal cases pending against Messrs. Zarowitz and Kilgore.

Mr. Parnas had conversations intercepted pursuant to a telephonic interception under 18 U. S. C. § 2518 authorized by Judge A. Andrew Hauk as to the telephones of Mr. Zarowitz. Mr. Gelbard was intercepted pursuant to a similar order as to the telephones of Mr. Kilgore.

The Government seeks to obtain the testimony of these witnesses and does not deny that, in the course of said testimony, the transcripts of the pertinent conversations may be used to refresh the witnesses' recollection as to the events at issue.

Both witnesses now move that transcripts of all their intercepted conversations be supplied them ten days before their testimony, claiming they are entitled to this disclosure under Section 2518(9) of Title 18, United States Code. In addition, witness Parnas claims he is entitled to the transcripts under Section 2518(10) of Title 18.

The Government opposes both motions on the grounds that the witnesses are not entitled to said transcripts under either cited section.

## ARGUMENT

*The Witnesses' Claims as to Section 2518(9)*

Section 2518(9) provides, in pertinent part:

> The contents of any intercepted wire or oral communication shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal . . . court unless each *party*, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the *court order*, and *accompanying application*, under which the interception was authorized or approved.
>
> * * * * *

[Emphasis supplied.]

It should be noted at the outset that no provision is made in the Section for discovery of the transcripts of intercepted conversations; only the order authorizing interception and the application for that order. (Furthermore, the applications and orders in these cases were sealed under 18 U.S.C. 2518(8)(b), and, to date, no effective effort has been made to move for their discovery by either witness.)

No provision whatever is made for the discovery of *transcripts* in subsection 9. Thus, the Government contends initially that the very terms of Subsection 9 preclude the witnesses' reception of transcripts in connection with their appearance before a Grand Jury.

This conclusion is reinforced by the wording of the subsection itself, since only a "party" to the trial, hearing, or other proceeding is entitled to even so much as the orders and applications prior to use in evidence of the tapes and transcripts. No person is a party to a grand jury proceeding, since it is not an adversary proceeding. *United States v. Levinson*, 405 F.2d 971, 980 (7th Cir. 1968). It is, by nature, an *ex parte* proceeding. *See, e.g., Costello v. United States*, 350 U.S. 359, 362, 364 (1956); *Coppedge v. United States*, 311 F.2d 128, 132 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963).

Should there be some doubt as to who is entitled to the orders and applications, and whether or not such orders and applications need be furnished *a witness* 10 days in advance of his testimony if he is to be examined on the contents of his telephone calls, such doubt is dispelled by the legislative history of Subsection 8. The Senate Committee stated, as to the 10 day requirement:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing. S. Rep. No. 1097, 90th Cong. 2d Sess. P. 105 (Apr. 29, 1968).
>
> [2 U. S. Code Cong. & Admin. News 2195 (1968)].

Thus, it is clear that a Grand Jury witness is not even entitled to the orders and applications supporting the interceptions, much less the tapes and transcripts of the intercepted conversations. *The Witness Parnas' Contentions as to Section 2518(10)*

Subsection 10 provides that a person aggrieved by a tap may make a motion to suppress the intercepted conversations. In connection therewith the Court, "in the interest of justice," may "in his discretion" make available to the aggrieved or his counsel portions of the intercepted communications.

Granting the terms of the Subsection, the fact is that the witness Parnas does not fall within them. No such motion to suppress has been filed, nor—to the Government's knowledge—is one contempalted. For a prerequisite to such a motion is discovery of the terms of the order and the contents of the application under 18 U.S.C. 2518(b) so that an intelligent and knowledgeable motion can be presented the Court. The witness Parnas has not even made a motion under 2518(8)(b) as yet.

Nor can he expect that Grand Jury proceedings be suspended until he does so. Since he is not now a defendant before this Court, his motion to suppress would have to be

of a civil nature and require at least 60 days before decision. Even putting aside this practical consideration, the motion to suppress in Subsection 10 was not intended by the Congress to be available to a Grand Jury witness to stay his appearance and testimony.

> Because no person is a party as such to a grand jury proceeding, the provision *does not* envision the mailing of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. . . . There is no intent to change this general rule. Id. at 106. [Emphasis supplied]
>
> *See also, Blue v. United States,* 384 U.S. 251, 255 n.3 (1965).

Therefore, the Government submits that the witnesses have no right to discovery of the tapes or transcripts of their intercepted conversations before their appearance before the Grand Jury under the cited Subsections of 18 U. S. C. 2518.

*Equitable Consideration*

Although not articulated as such, the witnesses have hinted that the Court should, in the interest of justice, allow the witnesses to see the transcripts of their intercepted conversations prior to their appearance before the Grand Jury.

Quite obviously, if the Government is going to use the transcripts to refresh the witnesses' recollection as to the matters of inquiry, said transcripts will be either shown or read to them at the appropriate time at any rate. No good reason would appear why the witnesses should have 10 days to review the transcripts.

Cases in which grand jury witnesses have asked to see the Government's evidence prior to testifying are rare indeed, possibly because few witnesses have the temerity to raise the point. Counsel's research has revealed, however, that the point was raised in *United States v. Winter,* 384 F.2d

204 (2nd Cir), *cert. denied.* 382 U. S. 905 (1965). In that instance the witness, Winter, claimed that he should have been apprised by the prosecutor of the other witnesses' testimony concerning his action, before he was called to testify before the grand jury. The Second Circuit soundly rejected this contention.

> [T]here is no duty upon the prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury—indeed it would appear that the Federal rules prohibit such disclosure. [Fed. R. Crim. P. 6(e). See *Hale v. Henkel,* 201 U. S. 43 (1906)] *An oath to tell the truth as one knows it is not conditional upon what others may have testified.* Id. at 210. (Emphasis supplied]

## CONCLUSION

For the reasons cited the Government respectfully requests that the motion of the Witness Parnas be denied and that the Witness Gelbard be directed to take the oath and testify.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

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**MEMORANDUM OF LAW RE RIGHTS OF WITNESS SIDNEY PARNAS UNDER THE SO-CALLED "WIRETAP STATUTE," TITLE 18 SECTIONS 2510 ET SEQ. U.S.C.**

[Filed February 16, 1971]

## I

## INTRODUCTION

The heart of this motion is simple—the witness, Sidney Parnas, an "aggrieved person" under Section 2510 (11) of Title 18 U.S.C., seeks due process under Sections 2518 (9) and (10). Because of the extreme shortage of time in which

to prepare this brief, movant refers the Court to the Xerox copies of the pertinent provisions of the wiretap statute, attached hereto as Exhibit A.

Under the law, the witness requests:

1. A copy of the Court Order, accompanying application and all portions of any wiretap material pertinent to defendant at least ten days before the contents of any wire or oral communication or derivative evidence shall be used or disclosed before the Grand Jury;

2. An opportunity to make appropriate motions under sub-section (10) (a).

In the discussion which follows, citations for propositions of law which counsel deems fundamental have been omitted but may be supplied at the time of the oral hearing onsFebruary 17, 1971.

## II

## FACTUAL BACKGROUND

The undersigned, counsel for movant, first met movant on February 9, 1971. This was one day prior to his scheduled Grand Jury appearance. At 2:30 P.M., on February 9, 1971, the undersigned commenced an interview with the witness Sidney Parnas during the course of which it was discovered that a search of the witness Parnas and the premises where he is employed was undertaken pursuant to a warrant based on an affidavit for same filed on or about December 10, 1970. Counsel reviewed the affidavit and discovered references therein to certain telephone conversations intercepted by the Government in which Sidney Parnas (while in New York City, where he works and resides) was apparently a party. The wiretap was apparently directed at another person and was carried on pursuant to an Order issued by a United States District Judge. Upon discovering same, counsel immediately read the so-called wiretap statute and proceeded to call Government counsel, Alfred N. King. Mr. King was asked if he intended to use the con-

tents of any intercepted wire or oral communication or evidence derived therefrom at the Grand Jury proceeding before which Mr. Parnas was summoned to testify and movant's counsel determined from the conversation that followed that Mr. King did intend to use such contents.

The following day, February 10, 1971, in the presence of the Grand Jury, the witness Parnas moved for additional time pursuant to sub-section (10) (a) of Section 2518 of Title 18 to make appropriate motions and also asked for the ten-day statutory notice under sub-section (9) and materials referred to in said sub-section.

## III

## DISCUSSION OF THE ISSUES

It has been pointed out to movant's counsel that the legislative history appertaining to the wiretap statute makes it clear that, although Mr. Parnas is an "aggrieved person" under sub-section (11) of Section 2510 of Title 18, sub-sections (9) and (10) of Section 2518 do not contemplate the furnishing of said information and opportunity to object before a Grand Jury. Attached hereto as Exhibit B are pages 2194, 2195 and 2196 of Volume 2 of the 1968 edition of the U.S. Code Congressional and Administrative News.

In initial response, it should be pointed out that it is Hornbook law that the Court need go no further than the terms of a statute if its provisions are clear. Sub-section (9) of Section 2518 states unequivocally that the contents of any intercepted oral communication or derivative evidence shall not be received in evidence or otherwise disclosed in *any* proceeding in a Federal or State Court without furnishing the party with a copy of the Court Order, accompanying application and such portions of the intercepted communication or derivative evidence as the Judge determines to be in the interests of justice. Note Section 10 (a) (iii).

With such a clear expression on the face of the statute there is no need to refer to the legislative history. Obviously, if it had been intended that sub-sections (9) and (10) of Section 2518 *exclude* Grand Jury proceedings, it would have been a simple matter for the law to so provide.

But it didn't—and there must be reasons therefor. Courts *fundamentally* afford ample protection of Constitutional rights even when a statute does not. That is to say, every statute must be read in light of the constitutional guarantee of due process and all that the term implies. It is not necessary, however, for a Court to reach for a constitutional construction of the wiretap statute—the statute itself has a fundamental concept of due process built into it in sub-sections (9) and (10).

In the case of *Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed. 2d 287 (1970)*, quoting from an earlier decision, the Court stated:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean 234 US 385, 394, 58 L Ed 1363, 1369, 34 S Ct 779 (1914). The hearing must be at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.'

Sub-sections (9) and (10) of Section 2518 merely codify this basic constitutional concept.

Why is the concept of notice and opportunity to be heard important in the present setting? Fundamentally, because we are dealing with the right to privacy, and not a tangible property right per se. The right to privacy is different from other property rights in several distinct particulars. In the ordinary sense, tangible property rights taken from a man

can be restored, and damages can, in theory at least, restore the status quo.

This is not true with the right to privacy. A bell once rung cannot be unrung. The witness Parnas does not appear to be the object of the massive electronic surveillance in this case; he apparently just had the misfortune to be talking with someone who was. But although *he* was not the object of the Government surveillance, it was *his* privacy that was invaded. That is to say, with no advance notice to him and no opportunity to prevent it, his conversations were overheard by Government agents.

Now, in the present setting, the Government attorney seeks to violate this privacy further by disclosing it to some twenty-three members of the Grand Jury without even giving Mr. Parnas notice that he was overheard and an opportunity to suppress this invasion of his privacy on any appropriate ground.

That is all the witness Parnas seeks of the Court: the notice provided for by the statute is sub-section (9) and a fair and reasonable opportunity to be heard under subsection (10). If the witness' objections are valid the Government *should* be prevented from abusing his privacy further. If his objections are overruled, the Government loses nothing.

What of the broad statement in the legislative history that furnishing a copy of the Court Order and accompanying application does "not include a Grand Jury hearing"? The Court will note that the legislative history makes reference to *Blue v. United States, 384 US 251 (1966)*. The pertinent language of the *Blue* case is set forth on Exhibit C. This case dealt with the extreme step of *barring* a Federal prosecution altogather. This, of course, is not the present case. The witness Parnas does not seek to bar anything. He merely wants his fundamental due process, notice and opportunity to be heard. Apparently implied in the interpretation of the *Blue* case by the draftsman of the legislative history is the implication that any evidence can be pre-

sented to a Grand Jury. The Court's attention is directed to this statement appearing on page 2195 of the legislative history ("Normally, there is no limitation on the character of evidence that may be presented to a Grand Jury, which is enforceable by an individual").

This is a gross misinterpretation of the law. The *Blue* case, in a footnote reference to the case of *Costello v. United States,* with citations set forth on Exhibit C, discussed the "abatement" of a prosecution before a Grand Jury based upon the presentation of tainted evidence. But the *Costello* case, which is now on very shakey grounds as a result of recent decisions of the Second Circuit Court of Appeals, simply held that hearsay evidence may be the basis of a valid Grand Jury indictment. The Court's attention is directed, however, to page 407 of *100 L.Ed.* at page 407 regarding the quashing of a Grand Jury indictment based upon a violation of the constitutional rights of the accused. We are not here dealing with a simple question of hearsay evidence before the Grand Jury. We are concerned with deeper constitutional issues. We need not rely on inferences of what the Court did not rely upon in the *Costello* case, h however, since the matter will be discussed hereinafter.

These points are self-evident:

1. The Federal Grand Jury is the arm of the Court and subject to its supervisory control. *74 Harvard Law Review 590.*

2. The Federal Court has power to prevent a prosecutor from performing in any manner which may violate a witness' constitutional rights before a Grand Jury. *Sheridan v. Garrison, 273 F.S. 673.(E.D.La.67); Chandler v. Garrison, 286 F.S.191 (E.D.La 68).*

3. Federal Courts have extensive ancillary powers to effect their jurisdiction. *Morrow v. District of Columbia, 417 F.2d 728 (D.C.Cir.1969).*

Now, if the constitutional rights of the witness Sidney Parnas *have* been violated, is it the Government's position

that he is utterly powerless to do anything about it? Must be sit idly by while his private conversations are used further before a Grand Jury? If he has no rights to prevent "disclosure" of his private communications before a Grand Jury, is it the Government's position that he must await trial before a judicial redress of these violations? If so, what happens if he is never indicted and there never is a criminal proceeding brought against him?

If his right to privacy has *any* meaning in our country, at the very least he should be able to hear what the Government has heard when it has heard it without any showing of probable cause and without any prior notice to him. These requirements, set forth in sub-sections (9) and (10) of Section 2518, are the minimum requirements before the Government can further abuse his privacy.

Mr. Parnas can hardly determine the nature and extent of the violations of his constitutional rights until he sees the application for the wiretap order, the Order and the wiretap material itself pertaining to him. He makes no motions at this time other than a request for fundamental due process - reasonable notice and an opportunity to be heard.

It is submitted that the Government attorney himself may not know what constitutional infractions have taken place pertaining to Mr. Parnas; further, the Government attorney should not be permitted to make an ex parte determination of that issue.

A full and complete disclosure of the extent to which the witness has been overheard should be made and then, in an adversary hearing, the witness' objections should be heard by the Court. In this regard, the Court's attention is directed to excerpts from the case of *Alderman v. U.S., 394 U.S.165, 22 L.Ed, at pages 192 and 193*, attached hereto as Exhibit D.

The Court's attention is directed to one final point. Despite the gross mis-statement of the law in the legislative history of the wiretap statute relating to the lack of limitation

of the character of evidence that may be presented to a Grand Jury, in *Go-Bart Importing Co. v. U.S., 282 U.S. 344 at 355*, the Supreme Court held that a Federal District Court has jurisdiction prior to an indictment on an Order to Show Cause where the petitioners raised questions under the Fourth and Fifth Amendments. For the Court's consideration, attached hereto as Exhibit E are pages 620 and 621 of 7 L.Ed.2d - from the opinion of *Di Bella v. United States, 369 U.S. 121*, dealing with the subject of pre-indictment motions to suppress.

Unlike the defendant in the *Blue* case or the defendant in the *Costello* case, the witness Sidney Parnas does not seek to bar the Grand Jury from proceeding further nor to quash an indictment based upon merely incompetent evidence—he seeks fundamental due process, notice and opportunity to be heard.

For all of the foregoing reasons, movant requests all of the rights afforded him in sub-sections (9) and (10) of Section 2518 of Title 18 of the United States Code.

Dated: February 16, 1971.

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**CRIMINAL MINUTES – GENERAL**

Case No. 2658 Date Feb 10, 1971

DOCKET ENTRY: Hrg; ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Witness moves Ct for cont of hrg. Ct grants mot & ords Hrg cont to 2/17/71 at 9am. All pts & auths to be fld by 2/16/71 at noon, by wit. Govt to file pts & auths by 2/12/71 at 12 noon. (EAC)

PROCEEDINGS: Government makes motion to the Court to compel the witness to answer questions before the Grand Jury. Court and counsel confer. Witness makes motion for continuance of hearing.

Court grants motion and orders bearing continued to 2/17/71 at 9am. Government to file all briefs by 2/12/71. Witness to have all briefs filed by noon on 2/16/71.

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## CRIMINAL MINUTES – GENERAL

Case No. 2658-Misc Crim Date Feb 17, 1971

DOCKET ENTRY: Cnsl argue met to Ct. Ct rules that matters are not to be litigated before the G/J and are not appropriate before this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appears that statute is Constitutional. Wit is ord by Ct to appear before the G/J & ans Questions propounded or he will be held in contempt of Ct. Wit advised that he still has the right to express 5th amndmnt privilege.

PROCEEDINGS: In the Matter of Grand Jury Testimony of Sidney Parnas

Hearing: Motion by Witness for Government to furnish transcripts of his intercepted conversations prior to the Witnesses' Appearance before the Grand Jury.

Court and counsel confer re motion. Counsel argue motion to the Court.

Court rules that these matters are not to be litigated before the Grand Jury and are not appropriate before this Court at this time. Court further states that the rights of the parties are sufficiently protected and it appears that statute is constitutional. Court orders witness to appear before the Grand Jury and answer questions propounded or witness will be in civil contempt of this Court. Witness is advised by Court that he has the right to express the 5th amendment privilege.

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## CRIMINAL MINUTES – GENERAL

Case No. 2658-MISC CRIM Date Feb 17, 1971

DOCKET ENTRY: In the Matter of Sidney Parnas, Witness before the Grand Jury

Hrg: Govt cnsl state wit has refused to testify before G/J. Ct reporter Nancy Long C.S.T. & reads Qs propounded to witness. Ct ords wit to ans Qs. Wit refuses to ans. Ct finds wit in contempt of Ct & ord wit committed to Custody of A/G unitl Qs ans or as long as the life of the G/J, which ever is shorter. Mot by cnsl for stay of exec of commitment until 12 noon on Feb 23, 1971. Witness to surr to U.S. Marshall on that date-Ct grants mot & ords wit to surrender on that date and time or bench warrant will issue for his arrest. (EAC)

PROCEEDINGS: Hearing: Court and counsel confer. Government informs Court that witness Parnas has refused to answer questions before the Grand Jury. Court Reporter Nancy K. Long is called and sworn. Court reporter reads questions propounded to the witness before the grand jury, and the responses given by the witness. Court questions witness and witness refuses to answer questions.

Court finds the witness in contempt of court for failure to testify before the Grand Jury and Orders witness committed to the Custody of the Attorney General until questions are answered or as long as the life of the Grand Jury.

Motion by counsel for witness for stay of execution until noon on 2/23/71—is granted by the Court. Court orders witness to surrender to U.S. Marshall on that date and time or bench warrant will issue for his arrest.

## NOTICE OF APPEAL
[Filed February 18, 1971]

Notice is hereby given that Sidney Parnas, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of District Judge E. Avery Crary entered in this action on February 17, 1971, holding the defendant in civil contempt of the court and committed into custody of the United States Attorney General until he purge himself of the contempt by appearing before the Thompson Federal Grand Jury in Los Angeles, California.

Dated: February 18, 1971.

[4] LOS ANGELES, CALIFORNIA, WEDNESDAY, FEBRUARY 17, 1971, 9:00 A.M.

THE CLERK: No. 1 on the calendar, 2636-Miscellaneous Criminal, In the Matter of Grand Jury Testimony of David Gelbard.

Case No. 2, 2658-Miscellaneous Criminal, In the Matter of Grand Jury Testimony of Sidney Parnas.

Counsel, will you please announce your appearances.

MR. MARKS: Good morning, your Honor. Burton Marks for Mr. Gelbard, who is present in court.

MR. MARSHALL: Adrian Marshall, your Honor, for Sidney Parnas.

MR. KING: Alfred N. King for the Government in the matter of Parnas, your Honor.

MR. THALLER: Robert S. Thaller for the Government in the matter of Gelbard, your Honor.

THE COURT: Very well. I have points and authorities of Mr. Marks and Mr. Marshall that I have examined.

Does anyone know what the result of the Blott case is? What disposition has been made of the Blott case down in Florida? That is the one you cited, Mr. Marks.

MR. MARKS: That is still pending before the [5] Fifth Circuit, your Honor. As far as I know there has been no—

THE COURT: What was the decision in the trial court?

MR. MARKS: In the trial court the contentions of the attorneys for Mr. Blott were held against him.

THE COURT: Were held what?

MR. MARKS: Against Mr. Blott.

THE COURT: The statute was held to be constitutional?

MR. MARKS: I would say that that is a fair statement.

THE COURT: I mean, I gather that from—

MR. MARKS: Yes.

THE COURT: —what you say, that it was held against him.

Does counsel for the Government know anything about that case?

MR. KING: Not under the name Blott, your Honor.

THE COURT: Did you read Mr. Marks' authorities?

MR. KING: For that matter, I never saw Mr. Marks' brief.

THE COURT: Oh. United States v. Phillip Blott, Southern District of Florida.

[6] MR. KING: Your Honor, there is a case in Florida that upheld the constitutionality of the statute. To my knowledge it was not—the one I know about is not the one he is citing, though. I think it is Filatoni.

MR. MARKS: It may be that Mr. Blott was representing the people from who I got the points and authorities.

THE COURT: Oh, I see. It may be the same case. Do you know the number of the case, the case you are talking about?

MR. KING: No, your Honor, I do not. I have a copy upstairs and I could probably get it.

MR. MARKS: I'm sure it is the same case because I was discussing the matter with attorneys in Florida and they tell me this is the first case that came out of Florida that is up to the appellate court.

MR. KING: It is probably the same case, your Honor.

THE COURT: Well, that was an adversary proceeding in which the constitutionality was squarely placed before the court, isn't that right?

MR. MARSHALL: Your Honor, I have what may besyou are looking for, the Escodar case.

MR. KING: That is the one I was trying to think of.

[7] THE COURT: Is it 143, 70-143?

MR. MARSHALL: No, it is 70-333.

THE COURT: What is that, is that the opinion of the court?

MR. MARSHALL: It is the opinion of the District Court in Florida regarding the overall questions, constitutionality of the questions.

THE COURT: It was raised at trial, wasn't it?

MR. MARSHALL: Yes, your Honor.

THE COURT: It was not a grand jury proceeding.

MR. MARSHALL: I believe it was a motion to suppress shortly prior to the trial.

THE COURT: In other words, there had been an indictment.

MR. MARSHALL: Yes.

THE COURT: It was not a grand jury proceeding matter.

All right. Go ahead. I will hear from the Government. You are going to talk about Parnas?

MR. KING: Yes, your Honor, and as far as it applies to Mr. Gelbard, also.

THE COURT: All right.

MR. KING: May it please the court, generally I think we can state—

THE COURT: You have read Mr. Marks' points [8] and authorities?

MR. KING: Yes, your Honor, I have.

THE COURT: All right.

MR. KING: Generally I think we can state with agreement that unless there is broad overreaching by the Government in the grand jury proceeding that the court will not invoke its supervisory power to decide at the time of the grand jury hearing what evidence is or is not admissable at trial.

As your Honor well knows, a grand jury in its precedents could indict by the private knowledge of its individual members, and such evidence, of course, could never be introduced at trial. So I think we may start out on that presumption, that unless there is a broad overreaching by the attorneys for the Government—

THE COURT: How do you determine if there is a broad overreaching?

MR. KING: Your Honor, I think you would have to go to basic concepts of fundamental fairness. If they are doing something that is totally unfair, then I think the courts will, in every instance, come forward and stop the Government from doing violence to the concept of due process. I think that is what we have to look to, the basic concepts of due process.

Also, I think we have to look a little bit [9] further than that, too, to the ability of the grand jury to do its work unencumbered by unnecessary motions brought by various witnesses that may be brought before it.

Now, there is no question but that the witnesses in these matters have several rights which are available to them.

I don't think there is a bit of question but that they have the right to obtain the application and orders which were filed before this court and led to the interception of their conversations. I don.t think there is a bit of question but they have a right to make a motion to suppress.

THE COURT: You are talking about in a grand jury proceeding now?

MR. KING: Not in a grand jury proceeding.

THE COURT: All right. Make yourself clear. We are talking now about a grand jury proceeding.

MR. KING: Yes, your Honor.

THE COURT: All right.

MR. KING: In the long run should they wish to make a civil motion to suppress in this court, I think they have a right to do it.

If they are called before the grand jury and if they think it is necessary they have a right to claim their privilege of silence under the Fifth Amendment. And if [10] you analyze it from top to bottom they may be harmed in no way except as a defendant before this court. And if they appear as a defendant before this court and the motion to suppress which they brought civilly or could bring as an adjunct in the criminal prosecution would fully protect their rights.

On the other hand, if we allow a motion to suppress to be brought in regard to a grand jury proceeding there are several detriments that do fall upon the grand jury. First of all,—on the courts, I might add, also, because we will have a proliferation of motions to suppress by various witnesses, each of which must be decided by some adjunct of this court, by some judge of this court independent of the motions to suppress which quite obviously will be brought

by Zarowitz and Kilgore in this matter. It will hold up the grand jury investigation and prevent it from reaching the testimony of these witnesses until such matters are finally cleared up.

I would like to remind the court the grand juries generally have an 18-month duration. If they are to be met with this type of obstructionism by every witness there is going to be precious little grand jury investigation done in this District.

The witnesses in their briefs—or I should say the witness Parnas' brief, at least, asks the question, [11] "Well, what happens if the defendant is never indicted?" Well, the simple answer to it is at that point there is no detriment to him.

What the Government is seeking purely and simply is the testimony of the witness Parnas. Now, with regard thereto I do not think that he has the right to obtain the transcripts and tapes of the intercepts. Should he make a motion for them I think he would be entitled to the orders and applications. But until we receive the brief—

THE COURT: When? Are you talking about so far as the grand jury is concerned?

MR. KING: No, sir.

THE COURT: Well, I know, but you are not making yourself clear. You are saying if he files a motion he is entitled to the application—period.

MR. KING: Not in connection with the grand jury proceedings.

THE COURT: Well, you had better make it specific. We are talking about a grand jury proceeding now.

MR. KING: If he comes in a separate action and files for those orders and applications, totally independent of his appearance before the grand jury—

THE COURT: I am not determining that.

MR. KING: I think you are, your Honor.

[12] THE COURT: All I am determining is he entitled to this in a grand jury proceeding. You don't have to argue what he is entitled to outside of a grand jury proceeding,

except your point is well taken that he does have the right to move to suppress if there is an adversary proceeding that results.

MR. KING: Yes, your Honor, and he has a right independent of the grand jury proceedings to start that adversary proceeding himself. But that has nothing whatever to do with the grand jury proceeding.

THE COURT: All right.

MR. KING: I have pointed out in my memorandum that ordinarily the Congress and certainly the law up to now has not recognized the general rights of a witness to, ancillary to his appearance before the grand jury, make a motion to suppress or to contest generally the evidence presented before the grand jury.

I would only say that only what is a great over-reaching by Government counsel that the court has a right to step in in a supervisory capacity over the grand jury, since the grand jury is an arm of the court, and say to Government counsel, "You will not do this," or "You will do that." I do not think we have reached that point in this particular matter.

As I pointed out in my memorandum, these [13] conversations will be used to refresh the witness' recollection. They can only be used for that point, if they are read or shown to the witness. He is going to see them should it become necessary. But he does not have to see them ten days in advance.

Should it become necessary, after they are read to him, he is free to withdraw from the grand jury room and consult with his counsel if he thinks that is necessary, and to decide with his counsel what answers he will make or whether he will make any answer at all. His rights in that regard are fully protected.

If, on the other hand, he is to be allowed ten days to examine transcripts and tapes—I don't put this at the door of present counsel or at the door of the present witnesses—but I would like to call to the court's attention the possibility that in the future some unscrupulous practitioner

might have ten days to sit back and figure out a story which the witness should tell to fit the facts he then knows the Government knows. That, I think, is not the way to seek truth in the court—in this court and should be avoided.

Now, basically those are the main considerations that I wish to bring to the court's attention. If the court has any questions I will be glad to try and answer them.

[14] THE COURT: I will hear from Mr. Marks or Mr. Marshall.

MR. MARSHALL: Your Honor, I have tried to confine my memorandum to the narrow issue before the court, whether or not the grand jury sitting might find my client, Mr. Parnas, is entitled to merely what the law provides.

I think it goes without saying he is an aggrieved party. I have never heard any claim to the contrary. I think Subsections 9 and 10 of Section 2518 must necessarily be read together. The statute is clear on its face. It provides that in any proceeding a witness is entitled to notice, and I presume that means with the thought that he will have an opportunity to be heard in filing any appropriate motions.

I raise the point in my memorandum that there is no question but that the court has definite power to control any proceeding before the grand jury.

I cited the Go-Bart case for the proposition that before any indictments are handed down a court may inquire into any propriety before the grand jury for the submission of any type of testimony or evidence.

I have submitted excerpts from the DiBella case to show these matters had been before the Supreme Court and at least tacit recognition had been given to the fact that there are pre-indictment motions. I don't think there [15] is any question about the court's authority. From that point on it is simply a question of due process.

I claim that until my client knows what was heard he can't have due process. He must have an adequate opportunity to study the application and the orders to test probable cause as it relates to him.

Wiretap orders in their present usage are directed primarily at one party. Perhaps probable cause may be established as to that party. But during the course of the mass of electronic surveillance by the Government perhaps dozens, maybe even hundreds of persons are over-heard and then subpoenaed before the court. If they are brought in and on short notice not even told that the Government had invaded their privacy, and they are ordered to answer questions regarding the contents of the overheard conversations, I think there is a fundamental denial of due process. I only ask, not to barter the grand jury proceedings, not to thwart it, but simply for an opportunity to be heard and study the probable cause as it relates to my client and see the contents of the transcripts, to permit him time, if necessary, to make any appropriate motions.

I don't think that basically you can unring a bell. If you walk in there, and if the Government is permitted to do this, then it is too late. There will be no matter before the court to be heard, and if my client's [16] privacy has been violated, even—

THE COURT: Can't your client confer with you after he is asked the question, "Didn't you on so-and-so say so-and-so," or "Wasn't there a conversation between you and so-and-so?"

MR. MARSHALL: Well, the problem with that, your Honor, is in the ordinary context of the search there is an inventory and there is property taken. Counsel has sufficient time to study the files and make necessary motions.

In this situation I wouldn't know what to do. I don't know about the validity of the transcripts, for that matter. Wire recordings are picked up and they are played back and typists make transcripts. I have had no time at all to check into that, but the most important part is I have no opportunity to object to the Government's invasion of the privacy of my client, simply no time at all at that point.

I wouldn't mind at that point, if on the first questioning he could walk out in the hall, and I would say, "Well, go no further until we have had it before a judge." But I think that is an inexpedient method of doing business.

So far as thwarting the progress of the grand jury, I believe I have covered that, your Honor. They can go on with their business as usual. If they would [17] afford a ten-day notice to witnesses perhaps in many cases the witness would not wish to test it further. But it is no excuse to step on a man's constitutional rights to say that the grand jury has to do business.

Basically, your Honor, I simply want time to study the application, the order and the contents before my client goes further. I think it is so important that if it is not the result at this point it is going to come up again, and I would even suggest that my client test the matter, respectfully. If you have any questions, your Honor—

THE COURT: No, I don't have any questions.

All right. I will hear the Government now on the other matter, the Gelbard matter.

MR. KING: I don't think the Government has anything to add at this time to the matter of the witness Gelbard. We view the issues as apparently the same.

THE COURT: Mr. Marks?

MR. MARKS: I will try and be brief, your Honor. I do not believe that the issues with Mr. Gelbard are the same.

Now, I think for the sake of the record here, we received an order to show cause re contempt, and the Government has offered no evidence nor has stated—or any authorities whatsoever that Mr. Gelbard was in contempt [18] of the grand jury or of this court, there having been no order of the court which he could have violated.

It is conceded that Mr. Gelbard did appear at the grand jury and merely refused to be sworn in, and was not ordered by a court to do so.

As I stated in my moving papers, I would be willing to stipulate such a thing had been done. But at the present status of the record Mr. Gelbard is here an order of the court to show cause why he should not be held in contempt, and I think that is a preliminary matter which should be disposed of.

MR. THALLER: Your Honor, the Government does concede that, in fact, Mr. Gelbard has not been ordered before the court and an order to show cause would be improper at this time.

But on the Government's pleadings in this I wonder if it would be appropriate at this time that the court order Mr. Gelbard to return and testify before the grand jury.

THE COURT: My understanding is that he appeared before the grand jury and refused—you said he refused to be sworn.

MR. THALLER: And to answer questions.

THE COURT: And to answer questions. Were questions put to him or he just said he would not answer them?

[19] MR. THALLER: Your Honor, I have the court stenographer here. My memory is vague on—

THE COURT: Were you present?

MR. THALLER: Yes, I was, your Honor.

MR. MARKS: Maybe I can refresh counsel's recollection. As I recall, Mr. Gelbard, pursuant to my instructions, would not be sworn and stated that because he did not have an opportunity to examine transcripts.

THE COURT: He would not answer—

MR. MARKS: He was then called back and asked, "Would you answer questions if it wasn't under oath?"

THE COURT: Yes.

MR. MARKS: And he said, "Not until I see the transcript," and then he was excused.

MR. THALLER: That is correct, your Honor.

THE COURT: All right. Then the status is this is not an order to show cause re contempt because he hasn't been ordered to—

MR. MARKS: Do anything.

THE COURT: —answer questions.

MR. MARKS: That is correct. Or be sworn.

THE COURT: Or be sworn.

MR. MARKS: Now, the first question before the court, your Honor, perhaps— and I don't know if the court wants to hear that—is a very simple question of whether or [20]

not there is any law of the United States which requires that a witness take the oath either by way of swearing to God or an affirmation.

I have carefully or as best I could researched the law and I find no authority that says a witness must be sworn. As a matter of fact, that particular provision is absent from the grand jury Rule 6. It doesn't talk about a witness testifying under oath or testifying.

One of the Rules of Criminal Procedure talks about that evidence shall be that which is testimony of the witnesses, plus whatever evidentiary material is introduced.

However, again the word "testimony" is not defined in any rule of court that I can find nor in any rule of law as meaning under oath.

As a matter of fact, my—it is hearsay only—as I understand it in some of the states they have what is known as unsworn statements, unsworn testimony. A defendant may get up—as a matter of fact, it caused some celebration a few years ago on one of these civil rights acts where the defendant got up and made an unsworn statement. I think it was under Georgia or Mississippi law, where he stated what his case was and he couldn't be cross-examined, and the jury was advised that this was testimony not under oath, and what the proposition was, that it didn't have the [21] force and effect if not under oath.

So the probability or the existence of unsworn testimony does exist, and I do not think under those circumstances that the witness could ever be ordered to be sworn or take an oath.

Getting aside from that particular proposition, the real question is does Mr. Gelbard have a right to refuse to appear before the grand jury, perhaps refuse to appear at all, because of the likelihood that his constitutional rights have been violated and the likelihood that the grand jury is going to use—and the Government is going to precipitate the use of evidence and materials which they had no right to have, in the first place.

Now, in my points and authorities, I suggested to the court that what we really have here is not so much of a Fourth Amendment problem, although the Fourth Amendment problem is clearly there because it says it is, "The seizure of words, intangible items comes within the purview of the Fourth Amendment." So it doesn't matter what Congress may have tried to interpose as a way to get around it, if the way to get around it comes in conflict with the Fourth Amendment and the rights which have been enumerated under that Amendment by the United States Supreme Court, then insofar as those rights are interfered with the statute is void and the Government cannot use the evidence for any [22] purpose whatsoever.

THE COURT: Didn't the court in Berger—as I recall the court reversed the lower court in that case in which a wiretap was accomplished on the approval of the district attorney.

As I recall, didn't the Supreme Court of the United States say in Berger that that was insufficient, that a wiretap on such orders would be unconstitutional. That it required something in the way of court approval or some showing before the court before a wiretap would be accomplished? Isn't that what it said?

MR. MARKS: Well,—

THE COURT: Doesn't this statute comply with that, in effect, with the Berger case, with the comments of the Supreme Court in Berger?

MR. MARKS: Absolutely not, because that was only one ground on which Berger was reversed. Although that was the articulated ground, they also went into a large discussion in Berger as to the scope and extent of the search, which is a general search. The length or duration of the permitted wiretap.

THE COURT: That is all covered in the statute, the length and duration.

MR. MARKS: That is right. But the point is that the lenght and duration is the same as the general [23] warrants which were condemned a long time ago. In other words,

the Government can hear under the—if that are using the statute as their pretext tap a man's line for thirty days and everybody he talks to, his doctor, his priest, his lawyer, his confessor, his most innermost protection, which he believes is privacy, is his and his alone.

THE COURT: That can't be used against him if on a motion to suppress the court decides that it was improper, on a motion to suppress.

MR. MARKS: If it can't be used against him, that is the whole point to—

THE COURT: On a motion to suppress in an adversary proceeding.

MR. MARKS: That is right.

THE COURT: We don't have that here. We have a proceeding before the grand jury, which is not an adversary proceeding.

MR. MARKS: Well, that – no, no, no, no. The adversary proceeding on the motion to suppress is the adversary proceeding permitted to the defendant to come in and challenge the probable cause, not the adversary proceeding of a court trial after he has been indicted.

What is it that permits the Government to invade somebody's privacy, is it the good faith of the Government?

[24] I don't believe there is such a thing.

THE COURT: It is the statute that allows it.

MR. MARKS: Well, if the statute allows something that the Fourth Amendment prohibits, that is unconstitutional and that the Government cannot use. That is one of the attacks we have here.

It is to me apparent that that is what is happening, and the Government is saying—and it is clear what they are saying is, "Let us hurry in and get all that information we can under the statute. Don't let anybody challenge it. Let's have all the secret grand juty proceedings in which we can gather evidence in violation of all these rights and then we'll say, 'Well, we are sorry,' and maybe the indictments won't come out, but we will have all the leads we need, all the information we need and nobody has been hurt because due process has been observed." I think that is a bunch

of–to use the euphonism, I think it is a lot of hogwash. It is obvious from the Government's pleadings what they want and what–

THE COURT: All right. Go ahead. Do you have anything further?

MR. MARKS: Yes. This other proposition is, and this court I know just yesterday–I think it had some argument with respect the First Amendment. Now, the First Amendment affords greater protection than the [25] Fourth Amendment. At least as far as I read the Supreme Court cases.

In this area you have invaded or the statute has invaded the rights to free speech. It has, in fact, imposed what I consider to be a prior restraint, just in the way that any statute which stops somebody from speaking imposes a prior restraint. Any governmental action which prevents somebody from speaking imposes a prior restraint.

I know now that the court is familiar with Blount V. Rizzi because, as I say, I met Mr. Fleishman in the hall yesterday and–

THE COURT: Rosenthal?

MR. MARKS: Mr. Rosenthal. I know they were arguing a case involving the First Amendment, Blout v. Rizzi, a very important case. If you take the proposition of Blout v. Rizzi–

THE COURT: You are using that by argument in analogy. It didn't involve wiretap.

MR. MARKS: No, but it involved the use of mails–

THE COURT: I say you are arguing by analogy. It didn't involve wiretap.

MR. MARKS: That is correct.

THE COURT: All right.

MR. MARKS: Incidentally, speaking about [26], wiretap, your Honor, before I get away from the subject, I have a case, Bubis–B-u-b-i-s–v. U.S. which I just came across, which is a Ninth Circuit case. In my understanding of that case–I will have to check it out–the Ninth Circuit dismissed

an indictment which was brought as a result of an illegal wiretap. So there is inherent power in this court to go behind—if that case stands for what I think it stands for—I will have to go to the library to find it—if it does, it stands for the proposition this court has the inherent power to decide whether there is an illegal wiretap and whether that infected the grand jury proceedings.

What you are not allowing here, and that is why I am discussing Blount v. Rizzi, is a prior adversary hearing which the Government wants to avoid at all costs, to make a determination as to whether or not the search warrant, that is to say, the application for a wiretap, which is a search warrant with an affidavit—and that is all this statute says it is—you are not permitted to challenge that search warrant before you go in and are questioned about what you said.

Now, in Blount v. Rizzi the Supreme Court reemphasized again the proposition that the mail—and that is all the analogy I have—is like your own tongue, and the minute you stop the mail you stop speech.

[27] When you go into the telephone situation, a man wants to call his lawyer, his priest and he knows that there is a possibility that he is being overheard or tapped by the Government, he therefore is restrained from speaking on the telephone, which is just as much a right to talk as he has to dend by the mails. And the Supreme Court in Blount v. Rizzi said that at the very least if you are going to stop it this way, if you are going to impose a prior restraint on speech you have to act with the utmost dispatch in permitting a challenge to the Government action and the Government has to take each and every step affirmatively.

In other words, what this statute must provide, in my opinion, in order to be constitutional, consistent with the First Amendment, is that immediately upon the return of the tap and its intended use by the Government there must be a motion by the Government to have the person informed that he was tapped and to have a challenge permitted as to the validity of the tap based upon the affidavits and underlying probable cause, because everything up

to the point of seizing that man's words or the words of somebody else, which is what happens with Mr. Gelbard. Mr. Gelbard's phone was tapped, your Honor. You can use any kind of sophistry or sophistication you want, and try and twist it and turn it, but Mr. Gelbard, the minute he talked to whoever he talked to on the phone, whose phone had his [28] phone tapped. Plain and simple.

His phone was tapped, his conversation was overheard. It is now going to be used and they admit it is going to be used because they want to use the transcripts to refresh his his recollection.

Now, why should a person whose privacy has been invaded whose telephone has been tapped without a warrant, not be able to challenge the validity of that tap, the prior restraint, the restraint on his speech prior to the Government being able to use it.

The whole tenor of the statute, and it is just on its face plain that the Government—and I mean the Government, meaning the executive branch, who tries to make arrests and investigations, wants to have a way to invade privacy that they can do under color of law and show some kind of respectability about it so the can say, "Look, we tapped your wire but we got a court order for it and now we will use the evidence and maybe we'll lose but right now we have sure got a nice tool." And if the Government has that evidence and that evidence is lawfully obtained they have got five years to file a complaint. Grand jury investigations don't get stale.

This court is very familiar, because right in this jurisdiction they had a grand jury proceeding going on for six months in the Friars Club case cantemporaneously [29] with the trial. Six months that grand jury went on and nothing got stale and they just called in witness after witness and they have had a years's grand jury, two years' grand jury, thae extend them. The only reason for their wanting to hurry is so they can use the evidence, get the witnesses, get the testimony and then if it is unlawfully seized, "Gee, we are sorry but we won't use it again." And even that

the court knows is not a fact because the Government, the agents to whom the information is transmitted will use it in their investigation and eventually the Government will come up and say, "Well, yes, there was an illegal wiretap over here, but that wiretap was attenuated, the taint was attenuated because we had independent corroboration," and no defendant in this world can ever challenge that because there is no way to know the Government sources.

So I say if you are going to talk about due process, fair play, rights constitutional rights which supersede the rights of the Government to have information, which is what they want, then you must permit Mr. Gelbard to have a challenge to the wiretap which tapped his telephone, his conversations, the invasion of his privacy, and that means a right to have a hearing before a judge, with the underlying affidavits, so that he can say, "You didn't have a right to tap my phone and the minute you listened in, that [30] was an illegal tap, and, grand jury, I am sorry, you can't use it."

The last proposition I give to the court is this: The grand jury is an arm of the court, that is, the judiciary. It is not an arm of the executive. Over a period of years the executive has attempted to – and it has been extremely successful, for the most part, in usurping the functions of the court in exercising its jurisdiction over the grand jury. At some point the court has got to stop and say, "No, the dignity of this court is such that we will not permit tainted evidence to be used." I think that is what the Bubis case said, because this is the grand jury that belongs to the cou not to the executive branch, "And, therefore, we will be meticulous to see that the constitutional rights of persons are protected," because that is the reason the Constitution was started in the first place, was to protect the citizen, the individual from outrageous governmental executive intrusion. Not the court, the executive intrusion. And that is why the Constitution came around, the Bill of Rights, to protect them against the Government, meaning the executive.

This court has to protect its own dignity. A case in point as to that inherent power of the court is Saldona v. U.S. I don't remember—it has been cited. That was a case very much in point, where the Supreme Court [31] looked at the procedures that were going on, and said, "Just a minute, this is our court. The dignity of the court is at stake and we have inherent power to tell the Government, 'Don't do this,' " to the executive branch, "You cannot do this in our courts." It is just like the doctrine of dirty hands in an equity case.

So I submit, your Honor, that at this stage of the proceedings Mr. Gelbard has a right to have his transcripts, to examine them. Not in the grand jury, but right there.

He also should have an opportunity to examine the underlying affidavits, and until that time the Government, the power of the court to subpoena a witness who is to be used within the framework of the materials of evidence seized by this wiretap should not be utilized and the subpoena should be quashed.

One final thing. We had a motion before Judge Williams—

THE COURT: I was just going to ask you about that. What happened to that?

MR. MARKS: The requests that were presented to Judge Williams for the transcripts, to have a hearing, to have the underlying affidavits were summarily denied, according to my information, without any hearing whatsoever.

There is only one—oh, I remember. Yes, there [32] was one thing that Judge Williams gave to Mr. Gelbard, and that is when they made a search of Mr. Gelbard pursuant, as I recall,—I think they made a search pursuant to the warrant at some point, and they seized some money from Mr. Gelbard. That was ordered returned, but that was about all we got out of the motion.

THE COURT: The motion before Judge Williams is the same motion you are making now?

MR. MARKS: Yes, but we never had a chance or opportunity—I am not making a motion here. I am saying—

THE COURT: I know, but the same matter before me now as to Mr. Gelbard was before Judge Williams.

MR. MARKS: Essentially, except that we instituted the motion.

THE COURT: Before Judge Williams.

MR. MARKS: Before Judge Williams. The first process procedure was I asked for an order shortening time because Mr. Gelbard was supposed to testify two days later. This was denied.

The Government then continued Mr. Gelbard's testimony and then I put in the 17-day notice and that came up two days before the next grand jury hearing.

In the meantime I filed a writ with the Court of Appeals asking for a temporary stay, which was [33] denied because the time had passed. I still have that petition pending with the court, I think. I don't know what orders they took on it, the Court of Appeals.

In the meantime Mr. Gelbard was ordered to appear, so I had to give him the instructions which I thought were appropriate under the contested matter which is there.

Now, again I say it is hard to understand why the Government is unwilling to supply the information, except—and the only articulated reason is, "We don't want to supply the underlying information and the transcripts because they may fall in the hands of some unscrupulous defense attorney who will then fashion a story of the witness." And I—

THE COURT: Let's get back to Judge Williams.

MR. MARKS: Yes.

THE COURT: There was a motion made. You say it was denied. Weren't you notified of the fact it was denied?

MR. MARKS: I was in another court, your Honor. I was in San Diego in trial, as I recall. My partner told me—

THE COURT: That it was denied.

MR. MARKS: Yes, that it was denied.

THE COURT: Did you take any steps to get him relieved before the Court of Appeals?

[34] MR. MARKS: I haven't taken any steps yet because the Court of Appeals writ was already on file, and two days later we had Mr. Gelbard come in front of the grand jury, and then we had this proceeding. I am just sit-

ting here waiting. The next thing I want to do, after this court makes a ruling, is send a supplementary application up to the Court of Appeals and tell them what has happened. I don't know how this court is going to rule, because if it rules favorably it is moot.

THE COURT: All right. I will hear from the Government.

MR. THALLER: Your Honor, before we go on, before Judge Williams, he denied defendant's motions down the line. The only thing was that the Government volunteered to return the money that was seized from Mr. Gelbard.

THE COURT: I am not concerned about that. That is an extraneous—collateral to this issue anyway, returning the money.

MR. THALLER: The cases that were brought up by defense counsel talk about a search, an intrusion, a seizure of communications.

THE COURT: The thing that bothers me is if Judge Williams has ruled on this, why is the Government bringing it before me now, if Judge Williams has already ruled on it?

[35] You are coming up because he wouldn't be sworn and answer questions, is that the reason?

MR. THALLER: That is right, your Honor.

THE COURT: What about this oath matter?

MR. THALLER: Your Honor, it is my understanding that either a man must make an oath or affirmation by statute. Either he takes an oath under God or he says, "I will tell the truth."

What the Government is interested in is that Mr. Gelbard come before the grand jury—

THE COURT: You mean before the grand jury. Do you have the statute you are talking about?

MR. KING: Your Honor, it is in Title 28. I am sure it authorizes an oath to be taken in any proceedings in a court of the United States.

THE COURT: I think that is right. See if you can find it here.

All right. Go ahead.

As I understand it, all you are asking now is that you want me to affirm Judge Williams' order, is that what you are saying?

MR. KING: Your Honor, as I recall—I may be wrong about this—I was told the rest of the matters, besides the money that was returned to him, were withdrawn from Judge Williams' consideration that time.

[36] Am I correct?

MR. THALLER: No, no, he denied the defense motions for all this material.

THE COURT: Then why are you bringing the matter here? I mean, if he was denied it, that motion has already been acted upon, hasn't it?

MR. KING: As to the witness Gelbard it has, your Honor.

THE COURT: Yes.

MR. KING: In that case then we would only ask that the witness be instructed to take the oath and testify or to exercise his privilege, as the case may be.

THE COURT: There must be a minute order in that file if Judge Williams denied it. You had better get the file and let's see what the order was, if there is any question about it.

MR. THALLER: All right, your Honor. I will do that right now.

MR. KING: As to the witness Parnas, this is the first time he has raised the issue, to my knowledge.

THE COURT: Yes, it wouldn't be a matter that has been raised before.

MR. KING: Aside from the oath several things were raised in the course of Mr. Marks' presentation.

THE COURT: He is raising the constitutionality [37] of the statute.

MR. KING: Yes, your Honor. I would just simply like to point out to the court that in every instance practically that he was arguing he was going from the premise of an unlawful search.

Now, at this point the search or the interception, if you will, is presumptively lawful, conducted under warrant,

under the supervision of a judge of this court and under a warrant issued by that judge. It is presumptively legal at this time.

Now, maybe if he wants to contest that, this is neither the time nor the place to do so. If there is much presumed bad faith on the part of the Government in Mr. Marks' argument, I don't think there is a great deal of comment necessary on that. I think it should be evident to the court that the Government is proceeding with all deliberate speed with its investigation, but at the same time is granting ample time to every witness that needs it to seek counsel and to do what he thinks he needs to do to protect himself.

As to the First Amendment argument, there is certainly no chilling effect on free speech here. There are procedural safegaurds in the warrant to such an extent that the ordinary citizen need ordinarily have no fear of having an interception conducted on his phone.

[38] The requirements of probable cause are not only there but they are confined to certain particular crimes. You have procedural safeguards as to inventory, and so forth.

As to the notice to the person tapped, of course, that is a decision that is made by the judge who is supervising the tap. It is not a decision that is made by the Government. Everything that Mr. Marks raises comes within the province of this court, really. It has been supervised by a judge of this court.

He mentions that Mr. Gelbard, who was tapped when there was no probable cause shown as to Mr. Gelbard. Well, even under a search warrant it is possible for the premises of an innocent third party to be searched to find contraband or evidence of a crime hidden there by the prospective defendant in the case. That's just one of the things that go along with the procedures that we have. It is rare, but it happens.

Mr. Marks argues that the Government is seeking attenuation of this evidence. I would dispute that we were seeking attenuation of this evidence. I would dispute that we were

seeking it. But even assuming that we were seeking it, we could not obtain it as to either the witness or the person whose phone was tapped. And I think the court should concern itself only with those two parties.

Now, it is possible we might get some attenuation under Wong Son or something like that. But [39] that would not concern either the witness or the party whose phone was tapped.

THE COURT: What about the legislative history? Nobody has mentioned that.

MR. KING: The legislative history might clearly indicate, your Honor, there is no contemplated motion to suppress to be made at the time of the grand jury hearing.

THE COURT: What the history says is that the proceedings—hearing and proceedings as used in the statute do not apply to grand jury proceedings.

MR. KING: That is correct, your Honor.

THE COURT: Why didn't the statute so provide?

MR. KING: Your Honor, to a great extent I think it does provide it. Because the statute says that you have to be a party to raise it. And I don't think that there is a party as such to a grand jury proceeding. It is an ex parte proceeding. There is no party to a grand jury proceeding, so I think the statute is quite clear.

THE COURT: All right. Go ahead. Anything further?

MR. KING: Nothing, unless your Honor has further questions.

THE COURT: I don't have any further questions. I would like to see what this order provides.

MR. MARSHALL: May I have another moment, your [40] Honor?

THE COURT: Yes.

MR. MARSHALL: I didn't realize you were going to get into the constitutional features of the statute, and I am not going to belabor the point.

THE COURT: I don't know that I am.

MR. MARSHALL: Well, you mentioned the Berger case and the attitude of the statute to comply with the Berger case.

THE COURT: Yes.

MR. MARSHALL: There is one more significant decision that was discussed at length in the legislative history and it is significant t oday, and that is the Katz case which Mr. Marks presented before the Supreme Court.

THE COURT: Yes.

MR. MARSHALL: In the Katz case—

THE COURT: I know the case. The electronic device on the telephone.

MR. MARSHALL: Yes, but the significant point in the Katz case was that the officers made a very strong effort to obtain one side of the conversation only. That is the very point I am raising before the court. They walk in on an application and get an order to tap X. There is probably a probable cause, your Honor, showing at that time. How about the dozens of people that talk to him? [41] This is my point. We don't have a chance to speak unless we are afforded notice and an opportunity to be heard.

Now, the statute does have certain procedural safeguards built into it, notably Subsection D of 2518. Now, if that notice is given, then a man can do something to bring the matter before the court. If he is never going to be indicted or if there is no indictment proceedings at all, no criminal action whatsoever contemplated against the man, is he totally without legal redress? Does he have any rights at all? That is the point I am making. I only want to be heard, just an opportunity to read the order, the application,—

THE COURT: I understand what you want.

MR. MARSHALL: But I can't see how the Government is out anything at that point.

THE COURT: Namely, that is your argument.

MR. MARKS: May I request one thing? I am in trial in Judge Hauk's court across the way. I don't—I am sure Mr. Gelbard would consent for the purpose of the rest of this hearing and the orders, any orders that the court might make, that Mr. Marshall could sit in for me.

My problem in this: If the court makes some orders with respect to Mr. Gelbard, I am in trial and I can't stand at the

jury room. What I am asking is I be given at least a week and hopefully two weeks in which he is ordered [42] to return back to the grand jury in order to make his appearance and do what the court orders. Today it is impossible–

THE COURT: Counsel being engaged, and so forth, you might have to be excused, you know, if you have somebody up there. I don't know what the situation is.

The grand jury comes back in a week? What is the position of the Government? You want to interrogate them today?

MR. KING: Yes, your Honor, we do want to interrogate them today. Bringing these people back here–

THE COURT: I am not going to delay it, Mr. Marks.

MR. MARKS: I would like to have the Government make a statement of why they have to do it today when this grand jury meets every week and this investigation has been continuing for, as far as I know, two or three months.

THE COURT: I suppose that is the reason, I don't know.

MR. MARKS: And it probably will be continuing for another two or three months in the future.

MR. KING: Your Honor, it may be quite possible–Mr. Thaller's case that he could hear him next week, I don't know, but I do not want to make a commitment to him, until I know he wants the grand jury back here next week. [43] I think it would be a gross inconvenience to the grand jury.

THE COURT: What about yours?

MR. KING: In my particular case, your Honor, I don't think we have the problem. I think Mr. Marshall is here, ready to represent his client if you order him to testify. That I will take care of today and I intend to wind up this phase of my grand jury presentation today, if I can do so.

THE COURT: I don't know. I want to see this order. Have you found that provision in the–

MR. THALLER: I just started looking it up.

THE COURT: Is Mr. Gelbard here?

MR. MARKS: Mr. Gelbard.

(Mr. Gelbard stands.)

THE COURT: Is it agreeable with you, Mr. Gelbard, that Mr. Marshall represent you in this proceeding if Mr. Marks leaves?

MR. GELBARD: Yes.

THE COURT: We are talking about this proceeding now.

MR. GELBARD: Yes.

THE COURT: Is it agreeable with you?

MR. GELBARD: Yes, sir.

THE COURT: All right. Then if that is the case, Mr. Marks, you may be excused and Mr. Marshall will [44] represent him. I don't know what the position of the Government will be so far as Mr. Gelbard appearing before the grand jury.

MR. MARKS: Thank you. I will be right across the hall.

THE COURT: We will take a short recess now, until counsel comes back with that order.

(Recess taken.)

THE COURT: Was there more than one motion you made before Judge Williams, Mr. Marks?

MR. MARKS: I thought that I had attached to my moving papers here all of the moving papers that I submitted to Judge Williams. Perhaps I am wrong.

THE COURT: There is a Motion to Quash Search warrant and For Return of Property Unlawfully Seized.

MR. MARKS: Right, under Rule 41.

THE COURT: All right. Now, is that the motion we are talking about?

MR. MARKS: That is the motion.

THE COURT: Well, you raised the issue of the grand jury transcript under the motion?

MR. MARKS: What I raised was the point that the warrant—this was the general tenor of my motion, that there were search warrants issued which were based upon unlawful wiretaps, and Judge Williams denied the specific [45] motion to quash the search warrant for, I assume, every reason that was raised.

THE COURT: You submitted this Blott memorandum before him, too?

MR. MARKS: No, your Honor.

THE COURT: You did not?

MR. MARKS: No, I did not. I didn't have the Blott memorandum.

THE COURT: This started, though, with Judge Williams and then it comes before me.

MR. MARKS: Right. Now that my recollection is refreshed, your Honor, the motion before Judge Williams although they raised some of the issues raised in this memorandum, were not squarely in point with the questions which are discussed here. In other words, I raised as a preamble to the invalidity of the warrants that the information that they obtained, in order to have an affidavit in support of a search warrant, was obtained by an unlawful telephone tap. But I was unable to have a hearing before Judge Williams to go into the question of whether or not the telephone taps underlying probable cause were unlawfully seized because we didn't have the affidavits to support the tap. So I would represent to the court in my opinion the issues are different. The decision was not ruled upon by Judge Williams, except insofar as he impliedly passed on the [46] statute as being unconstitutional, the wiretap statute, and that was raised specifically in my motion.

THE COURT: What did you find? Did you find the statute there?

MR. KING: Rule 6(c) of the Rules of Criminal Procedure authorize the foreman of the grand jury to administer an oath and empowering him to administer that oath.

THE COURT: All right.

MR. MARKS: I have no doubt, your Honor, that he has the power to administer oaths. The question is where does it provide that a court has the power to order a witness to testify under oath, because nowhere in the statutes of the United States is there anything that I can find, statutes or rules, that says a witness testifying must testify under oath or affirmation.

THE COURT: All right, gentlemen. I am ready to rule.

MR. MARKS: I am called, your Honor.

THE COURT: All right.

(Mr. Marks retires from the courtroom.)

THE COURT: In the Parnas matter, Rule 9, of course, applies only to the application and the order. Parnas claims he is a party aggrieved.

It doesn't appear to me that this is the time before the grand jury that these matters are to be litigated. [47] The party has the right to refuse to answer under his Fifth Amendment right, and in any subsequent matter he can move to suppress the wiretap. He will be confronted with it, in all probability, at the time he goes before the grand jury, and he can talk to his lawyer about the questions that are asked and what appears in the transcript, insofar as it is divulged to him.

But the long litigation that would be involved in these proceedings being held now I don't think is appropriate. I think the Costello case and the Blue case so indicate.

The Costello case says, "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

Mr. Marshall has set forth pertinent portions of the Blue case. I have read the Blue case. The Blue case says:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be [48] entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."

And then the footnote, "It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, . . ."

Now, it is true in the Blue case that the matter there would have terminated the prosecution of the offense. But I think the statements there are pertinent as well as the statements in the legislative history of the case, where, as to both 9 and 10, it appears very succinct by statements in the proceedings before the Senate Committee, that "'Proceeding' as used in the statute is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing."

They are talking about Rule 9 there, but they make comparable comments under Rule 10 where the court says, "Because no person is a party as such to a grand jury proceeding the provision does not envision the making of a motion to suppress in the context of such a proceeding itself."

[49] I think the rights of a witness are sufficiently protected. As to the constitutionality of the statute, of course, that is another matter, but it has been held by the Florida court to be constitutional.

I gather that Judge Williams in considering the motion that Mr. Marks made likewise considered the issue of the constitutionality of the statute.

I would hold that it was constitutional in the circumstances. It appears that legislature made every effort to comply with the ruling of the Supreme Court in Berger. So the witness Parnas is ordered to answer questions before the grand jury.

As I understand, he has refused to answer questions, is that right?

MR. KING: Not at this point, your Honor. He simply asked an opportunity to be heard before he was called.

THE COURT: Is he here?

MR. MARSHALL: Yes, your Honor.

(Mr. Parnas stands.)

THE COURT: Mr. Parnas, you are ordered to appear before the grand jury and answer the questions that are pro-

pounded to you, and if you fail to answer them, of course, the court may adjudge you in contempt. If you are adjudged in contempt, why, you are subject to imprisonment.

You have, of course, the right to exercise your [50] Fifth Amendment rights with respect to self-incrimination, and I am sure your counsel, Mr. Marshall, has fully advised you in that regard.

MR. MARSHALL: Your Honor, before we go on to Mr. Gelband; may I, in the interest of expediency, because I think the point is not frivolous, ask what the court's disposition may be if Mr. Parnas respectfully relied on his position before this court, if he were held in contempt.

I am asking primarily about the question of bail.

THE COURT: I do not grant bail in a contempt for witnesses before the grand jury. I will grant you a short stay in which you could go to the Court of Appeals if you saw fit.

MR. MARSHALL: One week?

THE COURT: Well, in view of the fact that this involves new constitutional matters and matters which there isn't a lot of precedents for I would be inclined to grant the witness a stay.

Now, if your grand jury will be back in a week, why, then, that would be—there would be no reason to make it shorter than that.

MR. MARSHALL: May I suggest a procedural solution?

MR. KING: Your Honor, I don't think we have an [51] appealable order until such time as he is held in contempt.

THE COURT: I think that is right, but he is asking what I would do.

MR. MARSHALL: That is right. I am trying to do it expeditiously. My client is not a healthy man and I don't want him to waste one day in jail if it is that important.

THE COURT: All right. I have indicated to you what I would do if he is found in contempt.

MR. MARSHALL: One week's stay. One more question, your Honor. Would he have an opportunity to purge

himself of that contempt if denied bail by the Circuit Court?

THE COURT: He is ordered in jail until he answers the questions.

MR. KING: Civil contempt.

THE COURT: It is a civil contempt. If he answers the questions, why, he has no problem at all.

MR. MARSHALL: I understand that, your Honor, but the order is, I understand, that you will stay your contempt citation imprisonment until I have an opportunity to present it to the Court of Appeals.

THE COURT: I am going to specify the time. I am not just going to say that it is stayed until you present it.

[52] MR. MARSHALL: I understand that, your Honor.

MR. KING: May it please the court, for the purposes of the record, you referred several times in your decision to Rules 9 and 10. I take it you were referring to Subsections 9 and 10 of the Act.

THE COURT: Yes, I was referring to Subsections 9 and 10 of the Act.

MR. KING: Of 10 USC 2518?

THE COURT: Yes, I was.

As to Mr. Gelbard, I find that he is required to appear before the grand jury and that he is required to be sworn and answer the questions propounded by the grand jury, for the same reasons that I have given with respect to Mr. Parnas.

Mr. Gelbard, you are ordered to appear before the grand jury and you are ordered to be sworn and to answer the questions of the grand jury. If you do not, you will be brought back before me and the issue of contempt will then be determined, and if you are found in contempt, why, the court will order you to jail until you answer the questions or during the life of the grand jury, whichever is shorter.

I believe that covers the matter now.

MR. KING: Thank you, your Honor.

(Whereupon, at 11:00 o'clock a.m., Wednesday, February 17, 1971, an adjournment was taken.)

[2] LOS ANGELES, CALIFORNIA; WEDNESDAY, FEBRUARY 17, 1971.
11:15 A.M.

THE FOREMAN: Raise your right hand, please.

You do solemnly swear the testimony you are about to give before this Grand Jury shall be the truth, the whole truty, and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE FOREMAN: Be seated.

SIDNEY PARNAS,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KING:

Q. Would you give your name for the Grand Jury, please, sir. A. I have something over here I would like to read, if I may.

Q. This is before or after you give your name? A. I don't know what I am supposed to do.

Q. Do you have counsel– [3] A. Never been in the Grand Jury before. The attorney gave it to me. I have never been before the Grand Jury in my life. He told me–

Q. Sir, this is your third appearance before this Grand Jury. A. I know, sir, I know that very well.

Q. Do you want to consult with your counsel before you answer the question as to what your name is. A. My name is Sidney Parnas.

Q. You are the same Sidney Parnas that has appeared before this Grand Jury, sir? A. Would you let me ask him this question, sir?

Q. Certainly, I think that would straighten things out faster.

(Whereupon the witness left the Grand Jury room at 11:20 and returned to the Grand Jury room at 11:23.)

THE WITNESS: Yes, sir.

MR. KING: I forget what the question was that I asked you.

THE FOREMAN: Was he the same Sidney Parnas that appeared before?

THE WITNESS: Yes, sir.

BY MR. KING:

Q. What is your present residence address, sir? [4] A. 77 Seventh Avenue, New York City.

Q. You have an attorney here today, sir, do you not? A. Yes, sir.

Q. And his name is Adrian Marshall? A. Yes, sir.

Q. Is Mr. Marshall outside the Grand Jury room door? A. Yes, sir.

Q. You are free to consult with him, you realize that, do you not, sir? A. Yes, sir.

Q. You realize you are free to consult with him at anytime you want to? A. That is right, sir.

Q. In connection with your prior appearances before this Grand Jury and of having been advised by your counsel, you are aware, are you not, that you have a right to refuse to answer any question if you honestly believe that the answer to that question would tend to incriminate you? A. Sir, I might as well read this statement. As I said, I am an amateur in this. I know that is none of your business or you don't care whether I am an amateur, pro or anything. I just want to read this statement.

Q. Have you been advised to, what I told you in this Grand Jury and previously now, that if you want to ask [5] your attorney whether or not you should answer, that you may leave the Grand Jury room? A. What was that, sir?

Q. Have you been advised by your attorney and on your prior appearances you need not answer any question if you honestly believe the answer to that question would tend to incriminate you, sir? A. Excuse me.

(The witness left the Grand Jury room at 11:26 and returned to the Grand Jury room at 11:28.)

THE WITNESS: What was your question, sir?

BY MR. KING:

Q. Have you been advised in your prior appearances before this Grand Jury and by your counsel that you need not answer any question the answer to which you believe might tend to incriminate you? A. Yes, sir.

Q. You do realize that you are testifying under oath here today, sir. A. Yes, sir.

Q. You do also realize if you make a false statement to this Grand Jury while under oath you are subject to prosecution under the statutes relating to perjury and false declarations. Do you understand that? A. Yes, that I—only common sense. I guess I do [6] understand it.

BY MR. KING:

Q. Now, what is your present occupation, sir? A. Now, can I read this to you, sir?

Q. You may. A. Thank you very much.

I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Now, sir, were you reading from a paper at that time? A. Yes, sir, right now, sir.

Q. Pardon me? A. From right now.

Q. All right. Was that paper supplied to you by your attorney Mr. Marshall? A. Yes, sir.

[7] Q. Now, is it your intention to read that paper everytime I ask you a question concerning your occupation and your association? A. Today, sir, yes, sir.

Q. For the purposes of the record, then, sir, I will ask you a few additional questions, and you may read that if you wish to do so; is that clear? A. Yes, sir.

Q. Do you know Mr. Jerome Zarowitz? A. You want me to read that again, sir?

Q. Please do, sir, if that is your intention and if that is your advice, please do so. A. For the time being I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize any overheard communications in which I engaged in until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the over heard material is disclosed before the Grand Jury.

Q. All right, sir. Now, to shorten this thing, from here on, if you intend to make that same statement to [8] any further questions, would you please simply say that "I refuse to answer on the same grounds." A. Yes, sir.

Q. Do you know Mr. John Baborian? A. Same thing, sir.

Q. You refuse to answer on the same grounds? A. Yes.

Q. All right. What ownership does Mr. Jerome Zarowitz have in Caesar's Palace Casino in Las Vegas? A. Same thing, sir. How do you want me to answer that?

Q. Just say, "I refuse to answer on the same grounds"– A. I refuse to answer on the same grounds.

Q. So it will be clear to anyone that examines this record just what we are doing.

Have you received at anytime any money, funds, credits or other things of value from Mr. Jerome Zarowitz? A. Same thing goes as I said before about this. I better write it down, because otherwise I will–

Q. You refuse to answer on the same grounds? A. I refuse to answer on the same grounds. All right, sir.

Q After you received this money, credit or other thing of value from Mr. Zarowitz, did you thereafter pass on [9] all of any portion of that money to Mr. John Baborian? A. I refuse to answer on the same grounds, sir.

Q. Are you aware that Mr. Jerome Zarowitz lives in Palm Springs, California? A. I refuse to answer on the same grounds.

Q. Is your occupation the manager of the Caesar's Palace reservation office in New York City? A. I refuse to answer on the same grounds.

Q. Are you aware that Mr. John Baborian is a resident of Providence, Rhode Island? A. I refuse to answer on the same grounds.

MR. KING: All right, sir. Mr. Grand Jury Foreman, would you excuse the witness to be brought before Judge Crary's court this afternoon at a time which I will later convey to his counsel.

THE FOREMAN: Sure. You are excused until this afternoon at 1:30 at which time you will reappear here.

THE WITNESS: Appear?

THE FOREMAN: Reappear here.

THE WITNESS: Right here, sir?

THE FOREMAN: At 1:30, please.

(Witness leaves Grand Jury room.)

(After noon recess the proceedings were reconvened at 1:30 P.M. and the witness, Sidney Parnas reappeared before the Grand Jury [10] and testified further as follows:)

EXAMINATION

BY MR. KING:

Q. Now, sir, for the purposes of the record, you are the same Mr. Sidney Parnas who appeared earlier this morning before this Grand Jury, and you were sworn at that time; is that correct? A. Yes.

Q. At that time you were asked certain questions, and you refused to answer those questions on grounds which you read to this Grand Jury at that time; am I correct? A. That is right.

Q. Since that time, have you had an opportunity to discuss those specific questions with your attorney? A. No,

I haven.t seen him at all. Just told me to read the same thing all over again in case you asked me.

Q. So it is not going to make any difference to you in answering those specific questions? A. No, that is just what he told me.

Q. All right, sir, I am going to go back over each one of those specific questions, and at this time, I will ask the Grand Jury Foreman to direct the witness to answer that question.

[11] Madam Reporter, would you please read the first question that we had concerning, I think his occupation.

(The record was read as follows:

"Q. What is your present occupation, sir?")

THE FOREMAN: Would you please answer that question, Mr. Parnas.

MR. KING: Would you order him to answer it.

THE FOREMAN: You are ordered to answer the question, Mr. Parnas.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. The same grounds you assigned this morning? A. Yes sir.

Q. Do you rely on any other privilege? A. I beg your pardon?

Q. Do you rely on any other privilege? A. I don't know what you mean.

Q. Like the Fifth Amendment or something like that or it is only this ground? A. It is only this ground as far as I know.

Q. Do you want to consult with your counsel? A. You would say I am better off; is that right? I will go ask him. What is the question?

Q. Do you rely on any other privilege such as the Fifth Amendment? [12] A. Outside of this?

Q. Yes.

(The witness left the Grand Jury room at 1:34 and returned to the Grand Jury room at 1:35 P.M.)

THE WITNESS: At this time, sir—

BY MR. KING:

Q. For the record, sir, you are the same Mr. Sidney Parnas who was just in this room? A. Yes.

Q. You left to talk with your counsel? A. Yes.

Q. Have you talked with your counsel? A. Yes, sir.

Q. Now, at this point I am going to have the reporter read the question to you that was asked previously about your occupation, is that clear, sir? A. Yes.

(The record was read as follows:

"Q. What is your present occupation, sir?")

MR. KING: Now, Mr. Foreman, would you instruct the witness and order the witness to answer that question.

THE FOREMAN: Mr. Parnas, you are ordered to answer the question.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. The same grounds you assigned [13] this morning? A. That is right, sir.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. Do you know Mr. Jerome Zarowitz?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Do you rely on any other privilege, sir? A. No, sir, not at the present time.

MR. KING: All right. Would you continue to the next question, Madam Reporter.

(The record was read as follows:

"Q. Do you know Mr. John Barborian?")

THE FOREMAN: Mr. Parnas, you are instructed to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Do you rely on any other privilege? A. Not at this time, sir.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. What ownership does Mr. Jerome Zarowitz have [14] in Caesar's Palace Casino in Las Vegas?")

THE FOREMAN: You are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. That is the same grounds that you assigned this morning? A. Right, sir.

Q. Are you relying on any other privilege? A. No, not at the present time.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. Have you received at anytime any money, funds, credits or other things of value from Mr. Jerome Zarowitz?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you gave this morning, sir? A. Right, sir.

Q. Do you rely on any other privilege? A. Not at the present time, sir.

MR. KING: Madam Reporter, the next question.

(The record was read as follows:

"Q. After you received this money, credit or other [15] thing of value from Mr. Zarowitz, did you thereafter pass on all or any portion of that money to Mr. John Baborian?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you assigned this morning, sir? A. That is right, sir.

Q. Do you rely on any other grounds or privilege? A. Not at the present, sir.

MR. KING: All right, sir.

Madam Reporter, would you read the next question.

(The record was read as follows:

"Q. Are you aware that Mr. Jerome Zarowitz lives in Palm Springs, California?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you assigned this morning? A. Yes, sir.

Q. Do you rely on any other privilege, sir? A. Not at the present, sir.

(The record was read as follows:

"A. Is your occupation the manager of Caesar's [16] Palace reservations office in New York City?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you stated this morning when you were here, sir? A. Yes, sir.

Q. Do you rely on any other privilege, sir? A. Not at the present, sir.

Q. This question wasn't read, so I will ask this question: Are you aware, sir, that Mr. John Barborian is a resident of Providence, Rhode Island?[

THE FOREMAN: Mr. Parnas, you are ordered to answer the question asked by Mr. King.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Would you read those grounds into the record for the purposes of the record before we take it downstairs. A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any questions in which you may utilize any overheard communications in which I engaged [17] until such time as I have been given an opportunity to review the application for the wiretap order, the wiretap itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Everytime that you have said the grounds you assigned this morning, those were the grounds that you assigned this morning; is that correct, sir? A. I beg your pardon?

Q. All of the other questions that we have gone over before we hit this last one you stated that you refused to answer on the grounds that you assigned in this morning's session, what you have just read was— A. Just read, yes.

Q. —was what you assigned this morning?

Mr. Foreman, would you excuse the witness until such time as the attorneys can bring this up in Judge Crary's courtroom.

THE FOREMAN: You are excused and to report to courtroom 3.

THE WITNESS: Do you want me to wait out here now?

THE FOREMAN: Yes.

[2] LOS ANGELES, CALIFORNIA; WEDNESDAY, FEBRUARY 17, 1971. 1:50 P.M.

THE FOREMAN: You do solemnly swear that the testimony you are about to give before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: That's right.

DAVID GELBARD,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. THALLER:

Q. Please state your name and spell your last name. A. David Gelbard, G-e-l-b-a-r-d.

Q. Mr. Gelbard, are you the same David Gelbard that appeared before this Grand Jury on February the 3rd? A. Yes.

Q. What is your address, sir? A. 6681 Maryland Drive.

A JUROR: What city is that?

[3] THE WITNESS: Los Angeles.

BY MR. THALLER:

Q. Mr. Gelbard, this Grand Jury is conducting an investigation into the use of interstate facilities for the transmission of gambling information, and you have been subpoenaed before this Grand Jury because this Grand Jury believes that you have information which will be beneficial to them in their investigation.

I wish to advise you of your rights at this time; that you have the right to have counsel here and to consult with counsel. He cannot come into this room, but you may go out and consult with him at anytime.

Do you have an attorney here with whom to consult? A. Yes.

Q. What is his name? A. Mr. Marks.

Q. Burton Marks? A. Burton Marks.

Q. Okay, sir.

Now, you also have a right under the Fifth Amendment to refuse to answer any question which I might ask you and which you think that your answer might incriminate you. That is to say, could make you subject to criminal prosecution. However, the Fifth Amendment right, I wish to advise you, is not available for the reason that you don't [4] wish to answer a question because you just don't care to or that it might injure a friend. Your Fifth Amendment right is available to you so that you do not have to incriminate yourself.

Do you understand my explanation of those rights? A. Yes, sir.

Q. Mr. Gelbard, where are you employed? A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to a wiretap order. I respectfully decline to answer any questions in which you may utilize any overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

MR. THALLER: Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

MR. THALLER: Off the record one moment.

(Discussion held off record.)

[5] MR. THALLER: Let's go back on the record. You have been ordered by the Foreman—

THE FOREMAN: Are you refusing to answer on the same grounds?

THE WITNESS: Is that all I am supposed to say: "I refuse on the same grounds?"

BY MR. THALLER:

Q. Yes. A. I refuse on the same grounds.

Q. Mr. Gelbard, do you know a man named Perry Paul? A. I refuse on the same grounds.

Q. These are the same grounds that you read to us? A. Yes.

Q. I notice you read those grounds from a sheet of yellow paper. A. Yes.

Q. From whom did you receive the paper? A. Mr. Marshall.

Q. That is the attorney Adrian Marshall? A. Yes, the gentleman that is outside.

Q. He is asking on behalf of your attorney Burton Marks? A. Yes, Burton Marks, he is in court.

MR. THALLER: Off the record one second.

(Discussion held off record.)

[6] MR. THALLER: Mr. Foreman, would you order the witness, David Gelbard, to answer the question: "Do you know a gentleman named Perry Paul?"

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

THE WITNESS: I refuse on the same grounds

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wagers for Perry Paul?

[ Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question posed by Mr. Thaller.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know a gentleman named Jerry Kilgore?

Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wages with Sam Farkas or Anton Kaleel?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer [7] the U.S. Attorney's question.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know Jerry Kilgore?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by the U.S. Attorney.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know that Jerry Kilgore receives his line from Las Vegas?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by the U.S. Attorney.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know Frank Rosenthal?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: You are so ordered, Mr. Gelbard.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wagers for Kilgore or Frank Rosenthal?

THE FOREMAN: You are ordered to answer the question, [8] Mr. Gelbard.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. THALLER:

Q. What are those? A. What I have read in this paper.

Q. Would you read those grounds. A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications to which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize any overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Now, Mr. Gelbard, the grounds that you have just read, are they the grounds which were the basis for your refusal to answer all the questions this afternoon? A. This was the advice of my attorney.

Q. Are there any other grounds for your refusal to answer these questions? A. I would have to confer with my attorney first.

Q. Okay. Would you please.

(Whereupon the witness left the Grand [9] Jury room at 1:55 P.M. and returned to the Grand Jury room at 2:00 P.M.)

BY MR. THALLER:

Q. Mr. Gelbard, have you had occasion to consult with your attorney? A. Yes.

Q. Now, can you answer my question: Do you have any other grounds for which you are— A. Until further order of the Court, I am standing on these grounds.

Q. Okay.

Mr. Foreman, if you would excuse the witness and ask him to appear promptly in Judge Crary's court, right now.

THE FOREMAN: You are excused to report to courtroom 3 on the second floor.

(The witness leaves the Grand Jury room.)

# Supreme Court of the United States

No. 71-110 ----October Term, 19--

David Gelbard and Sidney Parnas,

Petitioners

v.

United States

ORDER ALLOWING CERTIORARI. Filed December 14 ----------, 19 71

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------. Circuit is granted.